# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 108.

JOHN W. KERR AND JOHN DOE, PLAINTIFFS IN ERROR,

vs.

JOHN W. CLAMPITT AND JAMES H. NOUNNAN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

**FILED SEPTEMBER 6, 1875.**

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1 In the district court of the third judicial district in and for the Territory of Utah, county of Salt Lake.

JOHN W. CLAMPITT AND JAMES H. NOUNNAN, pl'ffs,
*vs.*
JOHN W. KERR AND JOHN DOE, DEFENDANTS.

The above-named pla'ntiffs complain of the above-named defendant, John W. Kerr, and of the defendant designated as John Doe, whose real name is unknown to pla'ntiffs, and which, when ascertained, they pray may be inserted herein, and for cause of action allege:

That at the times hereinafter mentioned the pla'ntiffs were copartners, carrying on the business of cutting, manufacturing, and selling certain articles used in the construction of railroads, known as railroad-ties, under the firm-name of Jno. W. Clampitt & Co.

That the said defendants were at the times mentioned hereafter copartners, doing business under the firm-name of John W. Kerr & Co.

That at Salt Lake City, county of Salt Lake, Territory aforesaid, on the 28th day of July, 1869, the said pla'ntiffs, under their aforesaid firm-name, and the said defendants, under their firm name aforesaid, made, executed, and entered into a written agreement, and then and there
2 duly signed and sealed the same, and attached thereto a revenue-stamp of the United States of the denomination of 5 cents, which was duly cancelled; which said agreement was in words and figures following, to wit:

[U. S. rev. stamp, 5 cents.]

This article of agreement, made and entered into this 28th day of July, 1869, by and between John W. Clampitt & Co. of the first part, and John W. Kerr & Co. of the second, all of Salt Lake City, Utah, witnesseth:

That the said Clampitt & Co. hereby agreed to furnish forthwith, free of all incumberance and trouble, to said Kerr & Co. forty-five thousand (45,000) good, dry railroad-ties, that will bear inspection, cut off at top, some fifteen miles above Soda Springs, Utah, (or Idaho,) and within four (4) and not to exceed seven (7) miles from Bear River, and not to exceed the average of six miles from said river, in a good, practicable country, and accessable for teams to get at and haul; and the said Kerr & Co. hereby agree to haul said ties so furnished to said river and flood the same (provided there is ample water in said river for the purpose) to their boom at Corinne, Utah, without any unnecessary delay.

And for such service so performed (or ready to be performed by said Kerr & Co. so soon as their teams can be reasonably fitted and taken there to said ties) the said Clampitt & Co. hereby agree to pay said Kerr & Co., within four (4) months from this date, twenty-seven thousand dollars, ($27,000,) it being at the rate of sixty cents per tie,
3 whether the said Clampitt & Co. furnished to the said Kerr & Co. the above-described said amount (45,000) of ties, or any portion thereof, or not.

And it is further agreed that said Kerr & Co. shall have an absolute lien on said ties from this date for said above consideration, and none of said ties to pass from the possession of said Kerr & Co. till said Kerr & Co. are paid in full for them and for any other indebtedness that may be due said Kerr & Co., as above stated, should said Clampitt & Co. fail to pay said Kerr & Co., or assigns, within four (4) months from this

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And for such service so performed (or ready to be performed by said Kerr & Co. so soon as their teams can be reasonably fitted and taken there to said ties) the said Clampitt & Co. hereby agree to pay said Kerr & Co., within four (4) months from this date, twenty-seven thousand dollars, ($27,000,) it being at the rate of sixty cents per tie,
3 whether the said Clampitt & Co. furnished to the said Kerr & Co. the above-described said amount (45,000) of ties, or any portion thereof, or not.

And it is further agreed that said Kerr & Co. shall have an absolute lien on said ties from this date for said above consideration, and none of said ties to pass from the possession of said Kerr & Co. till said Kerr & Co. are paid in full for them and for any other indebtedness that may be due said Kerr & Co., as above stated, should said Clampitt & Co. fail to pay said Kerr & Co., or assigns, within four (4) months from this

date, the above sum ($27,000) so described, then the said Kerr & Co. shall have full power and right to dispose of and sell said ties and apply the proceeds on the said indebtedness of said Clampitt & Co. to said Kerr & Co., and any surplus or balance that may arise after paying said Kerr & Co. and all the expenses for delays and commissions, &c., on the sales of said ties shall be paid over to said Clampitt & Co. Should the distance to said ties or any portion thereof exceed seven (7) miles from said river, then said Clampitt & Co. shall further pay (as above described) said Kerr & Co. at a pro rata rate, as above stated, for any and all such ties hauled for the distance exceeding seven miles, said Kerr & Co. to have the privilege at any time to sell said ties, or any portion of them, at the rate of not less than one dollar per tie prior to the expiration of the said four (4) months.

It is further agreed that should the said Kerr & Co. fail through
4 their inability to deliver any portion of said ties as above described within said four months, then said Kerr & Co. shall only be entitled to recover of said Clampitt & Co. in proportion to the amount delivered.

Witness our hands and seals this 28th day of July, 1869.

JOHN W. CLAMPITT & CO. [SEAL.]
JNO. W. KERR & CO. [SEAL.]

Attest:
W'M SLOAN.
JAMES M. CARTER.

The pla'ntiffs further alledge that they have faithfully and duly performed all the conditions and agreements agreed to be performed in this part or by them in said agreement.

That immediately before the execution of the aforesaid written agreement, they furnished to the defendants thirty-five thousand three hundred and thirteen good dry railroad-ties, at places about fifteen miles above said Soda Springs, of a good, sound, and serviceable character, cut off at the top, and in a country accessible to teams, and where hauling could be readily done; that none of the ties so furnished as aforesaid were more than seven miles distant from said Bear River, and that they were at an average distance of less than six miles from said river; that the said thirty-five thousand three hundred and thirteen ties so furnished were on or about the 6th day of August, 1869, accepted and received by the defendants under the aforesaid written agreement,
5 and as a full and satisfactory performance of the same by the defendants, so far as the same related to the number and quality of ties to be delivered.

The pla'ntiffs further alledge that the defendants did not haul or carry the said ties furnished and accepted as aforesaid by the defendants to said Bear River, as they had agreed to do, with reasonable diligence, and without unnecessary delay, but aver the fact to be that said ties were not hauled to the said Bear River until the 10th day of October, 1869, when with proper and reasonable diligence they could have been carried and hauled to said river on or before the 15th day of September, 1869.

The pla'ntiffs further alledge and show to the court that when the aforesaid thirty-five thousand three hundred & thirteen ties were furnished to the defendants by the pla'ntiffs and accepted by them, as above stated, on or about the 6th day of August, 1869, and then so continuously until the 1st day of January, 1870, there was an ample supply of water in said Bear River, fully sufficient for the transportation of all of

the said ties to the boom or timber bridge of defendants at Corinne, Utah Territory.

That the said defendants could and were able, with reasonable diligence, to have transported or flooded all of the said ties furnished as aforesaid by pla'ntiffs to their said boom or timber bridge on or before the 1st day of November, 1869.

That the said ties, by reason of the negligence, unskillfulness,
6 and want of diligence of the defendants, their agents and employees, were not transported or flooded to the boom or timber bridge above designated until late in the summer of 1870 or some time in the spring of 1871; and that the pla'ntiffs were not notified by the defendants that said ties had been received at said boom and would be delivered to them until May, 1871.

That on or about the 28th day of November, 1869, the pla'ntiffs notified the defendants that they were ready to receive the aforesaid ties, furnished as aforesaid, and demanded a delivery of them at their boom or timber bridge at Corinne aforesaid; that the said defendants did not deliver said ties, when a demand was then made, and never notified the pla'ntiffs of their readiness to deliver the same, or any portion thereof, until May, 1871, as before stated.

That the value of ties, (railroad-ties,) such as were furnished as aforesaid by plaintiffs, was, at the said town of Corinne, during the months of October, November, and December, 1869, not less than one dollar and ten cents a tie, and that the plaintiffs had continued to sell and deliver at or near said Corinne the said thirty-five thousand three hundred & thirteen ties (railroad-ties) to good, responsible, parties at the rate of one dollar and ten cents per tie.

That in consequence of the failure and neglect of the defendants to deliver said railroad-ties, furnished to them as aforesaid by
7 pla'ntiffs, without unnecessary delay and with reasonable diligence, as by the terms of their contract defendants were bound to do, the plaintiffs were unable to furnish and deliver said railroad-ties to the aforesaid parties who had agreed to receive and pay for the same at one dollar and ten cents per tie; that the damage thus sustained by the pla'ntiffs in consequence of the neglect and failure of the defendants to comply with their aforesaid contract was seventeen thousand six hundred and fifty-six dollars, which said last-mentioned sum, with interest from the 28th day of November, 1869, is now due, owing, and unpaid from the defendants to the pla'ntiffs.

For a further, seperate, and distinct cause of action against the said defendants, the pla'ntiffs alledge that heretofore, to wit, on or about the 6th day of August, 1869, the pla'ntiffs sold and delivered to the said defendants thirty-five thousand three hundred and thirteen (35,313) ties in Idaho Territory; that the said ties so sold and delivered were reasonably worth the sum of seventeen thousand six hundred and fifty-six dollars.

That the said defendants have not paid the said last-mentioned sum of money, nor any part thereof.

That there is now due and unpaid to the pla'ntiffs from the defendants the sum of seventeen thousand six hundred and fifty-six dollars on account of the railroad-ties sold as last aforesaid.

8 Wherefore the pla'ntiffs demand judgment against the defendants for the sum of twenty-five thousand dollars, and for their costs of action.

MORGAN & McCURDY,
TILFORD & MANN,
*Att'ys for Pl'ffs.*

TERRITORY OF UTAH,
*County of Salt Lake, ss:*

James H. Nounnan, being first duly sworn, deposes and says that he is the pla'ntiff; that he has heard read the above and foregoing complaint by his attorneys subscribed, and knows the contents thereof; that the same is true of his own knowledge, except the matters therein stated on information and belief, and as to those matters he believes it to be true.

JAMES H. NOUNNAN.

Subscribed & sworn to before me this 31st day of October, A. D. 1872.

[SEAL.] JOHN F. CAINE,
*Notary Public.*

9 In the district court of the third judicial district of the Territory of Utah, Salt Lake County. Term A. D. 187 .

JOHN W. CLAMPITT AND JAMES H. NOUNNAN, pla'ntiffs,
*vs.*
JOHN W. KERR AND JOHN DOE, DEFENDANTS.

The people of the Territory of Utah send greeting to John W. Kerr and John Doe, defendants:

You are hereby required to appear in an action brought against you by the above-named pla'ntiffs in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served out of this county but in this district, within twenty days; otherwise within forty days; or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of $25,000 damages for the non-fulfillment of a certain contract concerning railroad-ties, made and entered into between plaintiffs and defendants, July 28th, 1869, as set out in the complaint on file herein, and costs of suit.

10 And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said pla'ntiffs will take judgment against you for said sum of $25,000 and costs.

Witness the Hon. Ja's B. McKean, judge, and the seal of the district court of the third judicial district in and for the Territory of Utah, this first day of November, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] W'M S. WALKER, *Clerk.*

(Endorsed on the back as follows:) Original. District court third judicial district, county of Salt Lake. John W. Clampitt and James H. Nounnan, pla'ntiffs, against John W. Kerr and John Doe, defendants. Summons. McCurdy & Morgan et al., pla'ntiffs' attorneys. Filed Nov. 2nd, 1872. W'm S. Walker, clerk, by Still P. Taft, D. C.

TERRITORY OF UTAH,
*Salt Lake County, ss:*

I hereby certify and return that I received the within summons on the 2nd day of November, 1872, and I return that I duly served the same

on the above date by delivering personally to the within-named
11 defendant, John W. Kerr, a certified copy of the complaint, attached to a true copy of the summons. Done at Salt Lake County, Utah. I also return the other defendant, John Doe, not found.

JOHN D. T. McALLISTER,
*Territorial Marshal*,
Per BYRON GROO, *Dep'y.*

Marshal' fees, $2.

12 In the 3d district court of Utah T'y. Sept. term, 1872.

J. W. CLAMPITT & CO. ET AL.
*vs.*
JOHN W. KERR ET AL.

It is hereby stipulated and agreed that d'f'd't in above-entitled cause may have thirty days from this date to file and serve answer.

TILFORD & MANN,
*Pl'ff's' Att'ys.*

S. L. CITY, *Nov. 13th*, 1872.

(Indorsed :) 3d district court, Utah. J. W. Clampitt et al. vs. John W. Kerr. Stipulation. Filed Nov. 13, 1872. W'm S. Walker, clerk.

13 *Answer.*

In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

JOHN W. CLAMPITT AND JAMES H. NOUNNAN, pla'ntiff,
*vs.*
JOHN W. KERR AND JOHN DOE, DEFENDants.

I. The defendants, for answer to the 1st cause of action in pla'ntiffs' complaint herein, deny that said pla'ntiffs performed the conditions and agreements agreed to be performed on their part in said written agreement, in this :

II. That the said ties so by pla'ntiff cut and delivered to defendants for carriage were not delivered within seven miles or within an average of six miles of Bear River, nor in a place accessible to teams ; but, on the contrary, a large number were delivered at a distance over seven miles, and at an average distance of upwards of six and one-half miles from said Bear River, and in a place almost inaccessible to teams, whereby defendants were delayed in the transportation of the same, and put to great labor and expense, and damaged in the sum of $ .

III. Defendants further say that the ties so furnished by plaintiffs under said contract were not such as would bear inspection and
14 were not cut off at the top, and were not free from incumbrance, as provided in said contract they should be.

IV. Defendants further deny that they on the sixth day of August, 1869, or at any other time, accepted or received the said ties as full, satisfactory, or any proper performance of said written agreement so far as related to the number or quality of ties so agreed to be furnished by said pla'ntiffs.

V. Defendants deny that they failed, neglected, or refused to haul or carry the said ties to Bear River, or that they omitted or failed to use reasonable diligence, or that they were guilty of causing unnecessary delay in the transportation of the same.

VI. Defendants further deny that by the use and exercise of proper and reasonable or with any diligence they could have carried or transported the said ties to Bear River on or before the 15th day of September, 1869.

VII. Defendants further deny that on or about the 6th of August, 1869, and thence continually to the first of January, 1870, or at any time between said dates, the water in said Bear River was sufficient for the transportation of said ties to the boom or timber bridge of defendants at Corinne, Utah.

VIII. Defendants deny that they could by reasonable or any diligence have transported said ties on or before the 1st of November, 1869, or on or before any date earlier than the date of their actual transportation to and receipt at Corinne, to wit, on or about of March, 1870.

15 IX. Defendants deny that pla'ntiffs were not notified of the receipt of said ties at Corinne until May, 1871, but aver that pla'ntiffs were so notified on or about the day of March, 1870, and requested to pay to defendants the amount of defendants' charges and take away said ties or receive them at Corinne at defendants' boom or timber bridge.

XI. Defendants further deny that the value of said ties at Corinne during the months of October, November, or December, 1869, was not less than one dollar and ten cents per tie, and, on information and belief, deny that pla'ntiffs had any contract or could have sold said ties to any person, or any portion thereof, at and for the sum of one dollar and ten cents each, and aver that said ties were not worth in said market at any time upwards of forty cents each.

XII. Defendants deny that by reason of any failure or neglect of defendants pla'ntiffs were precluded from delivering said ties to any person who had agreed to receive and pay therefor $1.10 or any other sum or to any other person whatsoever; and deny that the pla'ntiffs by reason thereof or through any default of defendants have been damaged in the sum of seventeen thousand six hundred and fifty-six dollars or in any other sum.

I. And defendants, for further answer and counterclaim, say that immediately upon the execution of said contract they, pursuant thereto, without unnecessary delay and with all possible diligence and expedition, prepared and sent to the places w'ere said ties were fur-

16 nished by plaintiff the necessary teams to transport said ties, and did with all despatch and diligence transport the same to Bear River, pursuant to and in strict fulfillment of said contract on their part.

II. But defendants say that said ties were not cut off at the tops as required by said contract, and were distant from said Bear River upwards of seven miles, and at an average distance therefrom of more than six and a half miles, an' in a country inaccessible to teams, whereby defendants were delayed through the default of plaintiffs in the transportation of the same.

III. Defendants further say that from the sixth day of August, 1869, there was not sufficient water in Bear River to float said ties to Corinne, nor was there sufficient water in said river for said purpose prior to March, 1870. That defendants, using all reasonable diligence, did trans-

port said ties pursuant to said contract on their part to Bear River, and thence floated the same in November, 1869, to a point near Hampton's Bridge, when they were detained by low water and ice until March, 1870, and then floated to the boom at Corinne, reaching the latter place on or about the month of March, 1870, without unnecessary delay.

IV. And on or about the day of April, 1870, notified the said plaintiffs that said ties were ready for delivery to them at Corinne pursuant to said contract, and then and there demanded the said sum of twenty-seven thousand dollars then and there due from plaint-
17 iffs to defendants pursuant to said contract; but plaintiffs failed, neglected, and refused to receive or take said ties and to pay said sum or any part thereof, and have ever since refused to pay said sum or any part thereof, though often requested thereto.

Defendants further say that they have fully and faithfully done and performed all the conditions and agreements to be done and performed by them under and by virtue of said written agreement set forth in pla'ntiffs' said complaint and hereby prayed to be taken as part of this answer.

VI. Defendants further say that after plaintiffs had been notified of the arrival of said ties at the boom at Corinne, to wit, on or about the day of April, 1870, defendants necessarily paid and expended for removing said ties from the river to the bank and hauling them to the railroad track the sum of $4,872.54, for which said sum of $4,872.54 in addition to the said sum of $27,000 plaintiffs become and were indebted to defendants under said contract.

VII. Defendants further say that pursuant to the terms of said written agreement, and after having made demand on plaintiffs for said sum of $31,872.54, and given due notice to said pla'ntiffs', defendants on or about the 23 day of January, 1872, fairly sold the said ties for the best price they could obtain therefor, the same being the full market value of the same, to wit, the sum of forty cents per tie, amounting in the aggregate to the sum of $14,125.40 as a credit on the said
18 amount of $31,872.54 due defendants, leaving a balance of $17,747.30 still due and unpaid, for which said sum of $17,747.30 defendants pray judgment, together with interest at the rate of ten per cent. per annum on $27,000 from April, 1870, to January 23, 1872, and like interest on $17,747.30 from January 23d, 1872.

VIII. And for answer to the second cause of action in said complaint defendants deny that on the 6th day of August, 1869, or at any other time, plaintiffs sold or delivered to defendants 35,313 ties, or any other number of ties of the value of $17,656, or any other sum, and deny that they are indebted to plaintiffs in said sum or in any other sum whatever.

HEMPSTEAD & KIRKPATRICK,
*Att'ys for D'f'd't.*

TERRITORY OF UTAH,
*County of Salt Lake, ss:*

John W. Kerr, being duly sworn, says that he is one of the defendants; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters that are stated on information and belief, and as to those matters he believes it to be true.

JNO. W. KERR.

Subscribed & sworn to before me this 12th Dec., 1872.

WM. S. WALKER, *Clerk*,
By STILL P. TAFT, *D. C.*

19 Due service of copy of within answer this day is hereby acknowledged.
S. L. City, Dec. 12th, 1872.

TILFORD & MANN,
*Att'ys for Pl'ffs.*

(Indorsed:) Dist. court 3d dist. Utah. J. W. Clampitt et al. vs. John W. Kerr et al., d'f'ts. Answer filed Dec. 12, 1872. W'm S. Walker, clerk, by Still P. Taft, D. C. Hempstead & Kirkpatrick, d'f'ts att'ys.

20 JOHN W. CLAMPITT ET AL.
*vs.*
JOHN W. KERR ET AL.

We, the undersigned jurors in the above-entitled action, find a verdict for the pla'ntiffs, with damages, amounting to thirty-five hundred and eighty-three (3,583) dollars.
Salt Lake City, Nov'r 10, 1874.

A. C. GOODSPEED, *Foreman.*
PHILLIP MANGETTS.
JAMES Z. STEWART.
WM. E. SMEDLEY.
GEORGE DANFORD.
SOL SIEGEL.
HOWARD SEBREE.
R. G. ANDERSON.
C. REHMKE.
J. T. LITTLE.
JOHN CUNNINGTON.
LEROI REED.

20½ (Indorsed:) 3d dist. court, Utah. J. W. Clampitt & Co. vs. John W. Kerr & Co. Verdict. Filed Nov. 11, 1874. E'w'd B. McKean, clerk.

21 *Judgment on verdict.*

In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

JOHN W. CLAMPITT & JAMES H. NOUNNAN,
plaintiffs,
*vs.*
JOHN W. KERR & JOHN DOE, DEFENDANTS.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly empanneled and sworn to try said action. Witnesses on the part of plaintiffs and defendants were sworn and examined.

After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called answered to their names, and say they find a verdict for the plaintiffs, as follows:

"We, the undersigned, jurors in the above-entitled action, find a ver-

dict for the plaintiffs with damages amounting to thirty-five hundred and eighty-three (3,583) dollars.

"Salt Lake City, Nov'r 10th, 1874.

"H. C. GOODSPEED,
"*Foreman.*"

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiffs have
22 and recover from said defendants the sum of thirty-five hundred and eighty-three dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof till paid, together with said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of dollars.

Judgment rendered November 11th, A. D. 1874.

(Indorsed:) District court, third judicial district, county of Salt Lake. John W. Clampitt et al., plaintiffs, against John W. Kerr et al., defendants.

23 *Notice of motion for new trial.*

In the district court for the 3d judicial district, Territory of Utah.

TERRITORY OF UTAH,
*County of Salt Lake:*

JOHN W. CHAMPITT ET AL., PL'T'FFS,
*vs.*
JOHN W. KERR ET AL., D'F'D'TS.

To Mess. I. C. Hemingray, Tilford & Hagan, and McCurdy & Morgan, attorneys for plaintiffs:

You will please take notice that said defendants, on the fifth day of December, 1874, at the court-room of said court, in the Federal court-house in Salt Lake City & County, Utah Territory, at the hour of 10 a. m., or as soon thereafter as counsel can be heard, will move the court to vacate the judgment rendered in said cause on the 11th day of November, 1874, and to set aside the verdict therein and grant a new trial in said cause; said motion will be made and based upon the following grounds and assignments of errors, to wit:

1st. Newly discovered evidence material to the defendants' case which they could not with reasonable diligence have discovered and produced at the trial.

2d. Insufficiency of the evidence to justify the verdict.

3d. The verdict is against the law.

4th. Errors of law occurring at the trial and excepted to by defendants:

1st. That witness Alex. Majors, in response to a question by pla'ntiffs, was allowed to state from vague recollection and impression what he knew only from hearsay, viz, that between the 28th day of July, 1869, and the first day of January, 1870, he had heard of sales of white-
24 pine ties at Corinne at from 75 c'ts to $1.00 per tie; to which question and answer defendants then and there objected, and to the decision of the court overruling said objection defendants then and there excepted.

2d. The court sustained the motion of pla'ntiffs to strike out the tes-

timony of John W. Kerr touching incumbrances upon the ties, paid off by defendants; to which defendants then and there excepted.

3d. The court (the witness Alex. Topouce being on the stand) excluded the proof offered by defendants of incumbrances on the ties paid off by defendants; to which exclusion defendants then and there excepted.

4th. The court gave the 1st, 4th, 5th, 6th, 8th, and 9th instructions asked for by plaintiffs; to the giving of which instructions defendants then and there excepted.

5th. The court refused to give the 3d, 4th, 9th, 13th, and 14th instructions asked for by defendants; to which refusal defendants then and there excepted.

HEMPSTEAD & KIRKPATRICK, &
H. GAMBLE,
*Atty's for Def'd'ts.*

Nov. 16, 1874.

24½ (Indorsed:) In the district court for the 3d judicial district, Territory of Utah. 585. J. W. Clampitt et al. vs. Jno. W. Kerr et al. Notice of motion for new trial.

Service of copy of within notice hereby admitted this 16th day of November, 1874.

J. C. HEMINGRAY,
*Of Counsel for Plaintiffs.*

Filed Nov. 16, 1874.

E'W'D B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE,
*Deputy Clerk.*

25 In the district court for the 3d judicial district, Territory of Utah.

TERRITORY OF UTAH,
*County of Salt Lake:*

JOHN W. CLAMPITT ET AL, PL'T'FFS,
*vs.*
JOHN W. KERR ET AL., DEF'D'TS.

The above-named defendants hereby move the court to vacate the judgment rendered in this cause on the 11th day of November, A. D. 1874, and to set aside the verdict therein, and grant a new trial in said cause.

Said motion is based upon the following grounds and assignments of error, to wit:

1st. Newly-discovered evidence material to the defendants' case which they could not with reasonable diligence have discovered and produced at the trial.

2d. Insufficiency of the evidence to justify the verdict.

3d. The verdict is against the law.

4th. Errors of law occurring at the trial and excepted to by the defendants.

1st. That witness, Alex. Majors, in response to a question by plaintiff, was allowed to state from vague recollection and impression what he knew only from hearsay, viz, that between the 20th day of July, 1869, and the first day of January, 1870, he had heard of sales of white-pine ties at Corinne at from 75 cts to $1.00 per tie. To which question and

answer defendants then and there objected, and to the decision of the court overruling said objection defendants then and there excepted.

2d. The court sustained the motion of pla'ntiffs to strike out the testimony of John W. Kerr touching encumbrances upon the ties
26 paid off by defendants, to which defendants then and there excepted.

3d. The court (the witness, Alex. Topouce, being on the stand) excluded the proof offered by defendants of incumbrances on the ties paid off by defendants, to which exclusion defendants then and there excepted.

4th. The court gave the 1st, 4th, 5th, 6th, 8th, and 9th instructions asked for by the plaintiffs, to the giving of which instructions defendants then and there excepted.

5th. The court refused to give the 3d, 4th, 9th, 13th, and 14th instructions asked for by defendants, to which refusal defendants then and there excepted.

HEMPSTEAD & KILPATRICK & H. GAMBLE,
*Att'ys for Def'd'ts.*

(Indorsed:) In the district court of the 3d judicial district, Territory of Utah. J W. Clampitt et al. vs. John W. Kerr et al.

Service of copy of within motion hereby admitted this 16th day of November, 1874.

J. C. HEMMINGRAY,
*Of Counsel for Pl'ff's.*

Motion for new trial. Filed Nov. 16, 1874.
E'W'D B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE,
*Deputy Clerk.*

27 *Statement on motion for new trial.*

In the district court for the 3d judicial district of the Territory of Utah.

JOHN W. CLAMPITT ET AL., PLAINTIFFS,
*vs.*
JOHN W. KERR ET AL., DEFENDANTS.

This is an action for negligence on the part of defendant' in performing a contract made by and between the parties to this action on the 28th day of July, 1869, said contract being for the hauling of certain railroad-ties, then lying where they were cut & hewed, to Bear River, some fifteen miles above Soda Springs, and for flooding said ties by defendants down said Bear River to Corinne, in this Territory, said contract being in writing, and set out in hæc verba, in plaintiffs' complaint. The cause being regularly called was tried before the court with a jury, on the 30th & 31st days of October, 1874, and on the 2d, 3d, 4th, 5th, 6th, 7th, 9th, & 10th days of November, 1874.

The cause having been given to the jury, they found a verdict for plaintiffs, and assessed the damages at $3,583.

Defendants alle*d*ge, as a ground of a motion for a new trial, that the evidence was insufficient to justify the verdict, in this, that said evidence failed to show that defendants did not use reasonable diligence in per-

forming said contract, but, on the contrary, the evidence showed that defendants did use reasonable diligence in performing the same.

Upon the trial the following errors of law occurred:

Alex. Majors, a witness called for plaintiffs, on being interrogated by plaintiffs' counsel, testified that within the time specified in the
28 contract the market-price for red-pine ties at Corinne was $15.0, less the freight to Ogden, which was 10 c'ts, making the market-price for red-pine ties at Corinne $1.40; that white or yellow pine ties, such as those in this controversy, were worth about one-third less than red-pine ties. Afterwards, upon cross-examination, the same witness testified that he had a contract for his ties, and had no other way of fixing the market-value of the ties than his contract, and that his contract called for red-pine ties.

Afterwards, upon redirect examination, plaintiffs' counsel asked the same witness the following question:

Ques. Do you know by reputation what the price of white-pine ties were?

(Objected to by defendants' counsel as irrevelant, not redirect, and as hearsay. The court overruled the objection, and defendants excepted.)

Answer. I only go by my impression or vague recollection; my recollection is that they were sold at from 75 ct's to $1.00 apiece.

Whereupon defendants' counsel moved the court to strike out the last questions and answers for the reason last above given. The court overruled the motion, and defendants excepted.

James H. Nounnan, one of the plaintiffs, being sworn for plaintiffs, was asked by plaintiffs' counsel the following questions, to which the annexed answers were returned:

Ques. Do you know the market-value of ties at Corinne within four months from the 28th day of July, 1869?

(Objected to by defendants as irrevelant. Objection overruled by the court. Defendants excepted.)

Answer. I do.

Ques. What was it?

(Objected to as last above. Objections overruled by the court. Defendants excepted.)

Answer. Mine were worth $1.10.

Afterwards, upon cross-examination, in response to a question by defendants' counsel, the same witness testified as follows:

29 All I know of the market-price of ties at Corinne is from what I had a contract to sell mine for.

Afterwards defendants moved the court to strike out the testimony of witness Nounnan as to the market-value of the ties, because it was irrevelant, incompetent, and dependant upon the price fixed in another contract. The court overruled the motion, and defendants excepted.

That the witness for defendant, Alex. Topouce, being on the stand, defendants offered to prove by this witness,

"That there were parties on the ground claiming to be in possession of those ties, and claiming to hold a lien on them for the cutting and hewing, and who refused to give them up till they were paid for the same. That defendants offered to pay these parties if plaintiffs would acknowledge their claims; that plaintiffs did so acknowledge them, and defendants did so pay them."

The court erred in giving the 4th instruction asked for by the plaintiffs, as follows:

"If the jury believe from the evidence that it was impossible to have

delivered the ties at Corinne between the 28th day of July, 1869, and the 10th day of December, 1869, and the defendants nevertheless undertook to deliver them there within that period, they are bound by their contract, and the jury must find for the plaintiffs."

To the giving of which instructions defendants then and there duly excepted.

The court erred in giving the 8th instruction asked for by plaintiffs, as follows:

"Where both parties to a contract are innocent of wrong, and one of them must suffer, he whose fault occasioned the injury must bear the loss."

To the giving of which instruction defendants then and there duly excepted.

30 The court erred in giving the 9th instructions asked for by plaintiff, as follows:

"The parties to the contract in this action made and executed the same in view of the season and all natural objects existing at the date of the contract and to be encountered in its fulfillment."

To the giving of which instruction defendants then and there duly excepted.

The court erred in refusing to give the third instruction asked for by defendants, as follows:

"To entitle the plaintiffs to recover on this contract, they must have alle*d*ged and proved that they complied with all the conditions precedent, which were that the ties should be good, dry ties, which would bear inspection, free from incumbrances and trouble to defendants, within 7 miles from Bear River, in a good, practicable country, accessible for teams to get at and haul them, and that there should be ample water in Bear River to float them to Corinne; and plaintiffs must also have proved that defendants did not use ordinary diligence in hauling and floating said ties."

To which refusal defendants then and there duly excepted.

The court erred in refusing the fourth instruction asked for by the defendants, as follows:

"The delivery by plaintiffs to defendants of a stick of timber long enough to make two or more ties did not constitute a delivery of the number of ties which could be made from the stick, and defendants were not required by the contract to encounter the trouble and delay incident to cutting them into tie-length."

To which refusal defendants then & there duly excepted.

The court erred in refusing the seventh instruction asked for by defendants, which was as follows:

"If the jury find from the evidence that at the time of the
31 making of the contract Kerr & Co. had only 23 wagons, which fact was known to Clampitt & Co., and that the contract referred to the employment of those wagons only, then defendants were under no obligations to put more wagons on the work."

To which refusal defendants then and there duly excepted.

The court erred in refusing the thirteenth instruction asked for by defendant, which was as follows:

"If the jury find from the evidence that the performance of the contract was materially hindered or delayed by the ties not being accessible for teams to get at and haul them without the performance of extra work by defendants to render them accessible, or by the ties being more than 7 miles from the river, or by want of ample water in Bear River, or by the default of plaintiffs in not having the tops off, or in not having the

timber cut into tie-lengths, or that the performance of the contract by defendants was materially delayed by all these causes together, and that defendants used reasonable diligence, then defendants are entitled to the whole $27,000 in payment for their work."

(Marked on this instruction:) Refused and explained.

The last-named instruction was refused, to which refusal defendants then & there duly excepted.

The court erred in refusing the fourteenth instruction asked for by defendants, which was as follows:

"If the jury find from the evidence that plaintiffs were not in fault, and that the character of the country and the position and condition of the ties were as stipulated for in the contract, and that there was ample water in the river, but that the delay in delivering the ties at Corinne was caused by the difficulties incident to the undertaking, and that defendants used reasonable diligence, then defendants are entitled to 60 c'ts per tie for 35,313 ties which were ultimately taken to Corinne."

32 To which refusal the defendants then and there duly excepted

The court gave the first instructions which was asked for by the defendants, which was as follows:

"If the jury find from the evidence that defendants used reasonable diligence in preparing and sending out their teams and in hauling and floating the ties, then plaintiffs are not entitled to recover."

The court also gave the second instructions asked for by defendants, which was as follows:

"'Ordinary' or 'reasonable' diligence means that degree of diligence which reasonable and prudent men exercise in the situation of the parties, and in the business in which they are engaged, and varies according to the difficulties to be encountered and which might have reasonably been foreseen."

The court also gave the fifth instructions asked for by defendants, which was as follows:

"The defendants were only required to haul the ties in a good, practicable country, accessible for teams to get at and haul them, and if it was necessary for defendants to build roads and bridges, or to do other work in order to render the ties accessible, then defendants cannot be charged with the consequences of the delay caused thereby."

The court also gave the sixth instructions asked for by defendants, which was as follows:

"The defendants were only required to float the ties on Bear River provided there was ample water (which means fully sufficient water) for the purpose, and are not chargeable with the delay caused by the want of ample water."

The court gave the eight' instruction asked for by defendants, which was as follows:

"The diligence required of defendant' did not oblige them to em-

33 ploy for floating the ties a force so large as to be only needed in occasional emergencies, but only require' them to employ such a force as was reasonably sufficient for the whole undertaking."

The court also gave the ninth instruction asked for by defendants, which was as follows:

"The defendants were not bound under the contract to give plaintiffs actual personal notice of the arrival of the ties at Corinne, provided plaintiffs or either of the plaintiffs knew from other sources that they had arrived."

The court also gave the tenth instruction asked for by defendants, which was as follows:

"The demand for the ties alledged to have been made in November, 1869, by plaintiffs on defendants, if proved, would have amounted to nothing, as it is neither alledged or proved that said demand was accompanied by an offer to pay defendants for hauling and floating them."

The court also gave the eleventh instruction asked for by defendants, which was as follows:

"If the defendants or their agents discovered upon arriving at the ties that the character of the country or the condition of the river, or the character, situation, or condition of the ties was not as provided for in the contract, then defendants were not bound to abandon the contract, but might go on to perform their part of the contract and hold plaintiffs responsible for the failure of the conditions stipulated for in the contract."

The court also gave the twelfth instruction asked for by defendants, which was as follows:

"If the jury find from the evidence that the ties were in danger of being lost or damaged while in the boom at Corinne, then defendants are entitled to the reasonable cost of having them removed."

The foregoing embrace all the instructions asked for by defendants, and either given or refused.

34 The court also gave the following instructions asked for by plaintiffs, and made a note on the margin of each, as herein set forth.

Explained and given in modified form.

1. "If the jury believe from all the evidence that any witness on the trial of this cause has wilfully testified falsely in respect to any material fact, it is their duty to disregard the whole of such witness's testimony." (3 Kansas, 496, and cases cited.)

Refused, but given in modified form.

3. "The defendants, by their contract, undertake to deliver the ties within four months from the date thereof, or either a reasonable time, and if the jury believe from the evidence that it was possible for defendants to have delivered the ties at Corinne between the 28th day of July, 1869, and the 10th day of Dec., 1869—that was a reasonable time—they must find for the plaintiffs." (Chitty on Contracts, 734–6; Barker vs. Johnson, 19 Windall, 500; 2 Parsons on Con., 184–6.)

Given in qualified form.

5. "If the jury should find for the plaintiffs, they must fix their damages at the market price of the ties at Corinne at the time they find the ties were to be delivered there, deducting sixty cents per tie for all so delivered." (Angell on Carriers, § 482 & 482 *a*.

Given with this qualification: Provided there was ample water in said river for the purpose.

10. Instructions proposed on the part of the plaintiffs. The jury are instructed that it is an admitted fact in this case that the plaintiffs delivered and the defendants received from plaintiffs 35,313 R. R. ties at the point where they were manufactured, and that said property was so received by defendants to be by them transported for hire to the boon or timber-bridge of def'ts at or near Corinne, under the agreement set out in the complaint herein, and that def'ts were to receive for such services the price set out in said agreement, and were to deliver such property to plaintiffs at said boom or timber-bridge without unnecessary delay.

The testimony showed that many of the ties were left in lengths of two, three, four, five, and the testimony of plaintiff Nounnan was that some of them were left in seven lengths.

There was some testimony going to show that the ties could be more readily hauled in double lengths than single lengths, and there was testimony showing that no objection was made by the defendants or their agents to the lengths of the timber, and that it was easier to get them out of the woods in double than in single lengths. But witness Toponce, who had charge of the work for defendants, testified that by making cribs he could have had them loaded and hauled more easily in single lengths. This testimony is referred to in connection with the fourth instruction asked for by defendants, and which was refused by the court.

On behalf of defendants, Alex. Toponce and John W. Kerr testified that at the time the contract was made John W. Kerr & Co. had only 23 wagons; that said wagons needed to be repaired and fitted up to render them fit for service; that the number of wagons owned by Kerr & Co., and their condition, was known to Clampitt & Co. when the contract was made, and that the contract referred to the employment of those wagons only. The testimony of Kerr, Toponce, and of George Butterbaugh further showed that instead of relying upon the use of those 23 wagons only, that Kerr & Co. bought 18 additional wagons, 11 of which were ready for immediate use, and employed them in performing the contract. This testimony is pertinent in connection with the seventh instruction asked for defendants, and refused by the court.

It is hereby agreed that the foregoing shall constitute the statement on motion for new trial in the above-entitled cause, and is correct.

March 20, 1875.

HEMPSTEAD & KIRKPATRICK,
*Att'ys for Defendants.*

J. C. HEMINGRAY,
*Att'y for Plaintiff.*

(Indorsed:) In third dist. court, U. T'y. J. W. Clampitt et al. vs. J. W. Kerr & Co. Settled statement on new trial. Filed March 20, 1875. E'w'd B. McKean, clerk.

37 In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

JOHN W. CLAMPITT ET AL., PLAINTIFF',
*vs.*
JOHN W. KERR ET AL., DEFENDANTS.

The motion for new trial made in this action by defendants and heretofore submitted on the record herein, after due consideration thereof, is now overruled, and the same is refused upon the following grounds, to wit:

First. The evidence in said action was sufficient to justify the verdict therein, and the said evidence did show that the defendants had not used reasonable diligence in performing said contract set out in the complaint, and for damages for a violation of which said action was instituted.

Second. There were no errors of law in admitting or rejecting testimony at the trial of said action.

Third. The court did not err in giving the 1st, 4th, 8th, & 9th instructions asked for by plaintiffs and excepted to by defendants.

Fourth. The court did not err in refusing the 3d, 4th, 7th, 13th, & 14th instructions asked for by defendants.

The court can perceive no errors occurring at the trial.

The motion for new trial is therefore refused.

Dated & filed May 1, 1875.

D. P. LOWE,
*District Judge.*

38 TERRITORY OF UTAH,
*Third Jud. District:*

In the district court of the third judicial district of said Territory, county of Salt Lake.

JOHN W. CLAMPITT & CO., PLAINTIFFS,
*vs.*
JOHN W. KERR & CO., DEFENDANTS.

Please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of this Territory from the judgment therein made and entered in the said district court on the eleventh day of November, 1874, in favor of the plaintiffs in said action, and against said defendants, and from the whole thereof, and also from the order made and entered therein in said court on the 1st day of May, 1875, overruling the motion of def'ts for a new trial.

Respectfully,

HEMPSTEAD & KIRKPATRICK,
*Att'ys for Def'ts.*

To the clerk of said dist. court, and to J. C. Hemingray, and Tilford & Hagan, and Morgan, att'ys for plaintiffs, Salt Lake City, U. T.

(Indorsed:) Third dist. court of Utah. John W. Clampitt et al. vs. John W. Kerr & Co.

Notice of appeal filed May 3, 1875.

E'W'D B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE,
*Deputy Clerk.*

Service of copy of within acknowledged this 3d day of May, 1875.
TILFORD & HAGAN,
HEMMINGRAY & MORGAN,
*Att'ys for Pl'ffs.*

39 Defendants may have until and including the 12th day of December to serve this statement.
Dec'r 11, 1874.
J. C. HEMINGRAY,
*Att'y for Pl'ffs.*

Copy served this 12th day of December, 1874. Numbering lines waived.
J. C. HEMMINGWAY,
*Att'y for Pl'ffs.*

(Indorsed:) For the district court for the 3d judicial district, Territory of Utah. J. W. Clampitt et al. vs. John W. Kerr et al.

Statement on motion for new trial filed Dec. 11, 1874.
E'W'D B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE,
*Deputy Clerk.*

40 In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

JOHN W. CLAMPITT & JAMES H. NOUNNAN, pl'ffs,
*vs.*
JOHN W. KERR, DEFENDANT.

To the said defendant and his att'ys, Mess. Hempstead & Kirkpatrick and Gamble:

Take notice that the pl'ffs in the above-entitled action will move the judge of said court to settle the statement on motion for new trial pending in said action. This motion will be made on the 15th day of February, 1875, at the opening of the court, or as soon thereafter as counsel can be heard at the Federal court-room, in Salt Lake City, before the judge of said court.

C. W. MORGAN,
TILFORD & HAGAN, AND
HEMMINGRAY,
*Att'ys for Pl'ff.*

(Indorsed:) Third district court. John W. Clampitt & Co. vs. John W. Kerr.
Filed Feb'y 13, 1875.
E'W'D B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE,
*Deputy Clerk.*

Service of copy of within notice admitted this 20th Feb'y, 1875.
HEMPSTEAD & KIRKPATRICK,
*Def'ts Att'ys.*

41 TERRITORY OF UTAH,
*County of Salt Lake:*

In the district court for the 3d judicial district of the Territory of Utah.

J. W. CLAMPITT ET AL., PLAINTIFF,
*vs.*
JOHN W. KEER ET AL., DEFENDANT.

Whereas the defendant' in the above-entitled action appeal to the supreme court of the Territory of Utah from a judgement made and entered against them in said action in the said district court in favor of the plaintiffs in said action on the 11th day of November, 1874, for thirty-five hundred and eighty-three dollars damages and three hundred ninety-six $\frac{50}{100}$ dollars costs of suit, and also from an order made and entered on the first day of May, 1875, overruling defendant's motion for a new trial:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Louis Cohn, merchant, and Frederick H. Meyers, smelter, both of the county of Salt Lake, do hereby jointly & severally undertake and promise on the part of the appellants that the said appellants will pay all costs and damages which may be awarded on the appeal, not exceeding three hundred (300) dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying execution of said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of eighty hundred and sixty-six dollars, being double the
42 amount named in the said judgment; that if the said judgment appealed from or any part thereof be affirmed the appellants shall pay plaintiff the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal.

FREDERICK H. MEYERS.
LOUIS COHN.

TERRITORY OF UTAH,
*County of Salt Lake:*

Louis Cohn and Frederick H. Meyers, the persons named in and who subscribed the foregoing undertaking, being duly sworn, each for himself says: I am a resident within this Territory and county, and am worth double the sum specified in the above undertaking over and above all my debts and liabilities exclusive of property exempt from execution.

LOUIS COHN.
FREDERICK H. MEYERS.

Subscribed and sworn to before me this 8th day of May, 1875.
C. A. GOULD,
*Notary Public and Deputy Clerk Supreme Court of Utah Territory.*

42½ (Indorsed:) 3d dis'ct court, Utah. John W. Clampitt & Co., plaintiffs. Amendments proposed by plaintiffs to defendants. Statement on new trial. John W. Kerr & Co., defendants. Served this 19th day of December, 1874, Hempstead and Kirkpatrick, att'ys for defendants. Filed Dec. 19, 1874. E'w'd B. McKean, clerk. Tilford, Morgan, Hemmingray, pq.

43 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake, on the 11th day of November, A. D. 1874.

Present, the Hon. Ja's B. McKean, judge of the third judicial dist.

J. W. CLAMPITT & CO., PL'FFS,
*vs.*
JOHN W. KERR ET. AL., DEF'TS.

The jury in this case came into court and, being called, presented the following verdict, viz:

We, the undersigned jurors in the above-entitled action, find a verdict for the plaintiff, with damages amounting to thirty-five hundred and eighty-three (3,583) dollars.

Salt Lake City, Nov. 10, 1874.

H. C. GOODSPEED, *Foreman.*
PHILIP MARGETTS.
JAMES B. STEWART.
W'M E. SMEDLEY.
GEORGE DUNFOSEL.
SOL. SIEGEL.
HOWARD LEBREE.
R. Y. ANDERSON.
C. REHNIDE.
J. T. LITTLE.
JOHN CUNNINGTON.
LEVI REED.

Execution stayed for twenty days, to give defendants' counsel time in which to file notice of motion to set aside judgment on verdict and to make motion for new trial.

I, E'w'd B. McKean, clerk of the district court of the 3d judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made on the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand & the seal of
44 said court this sixteenth day of June, A. D. 1875.

E'W'D B. McKEAN,
By WILLIS P. McBRIDE,
*Dep'ty Clerk.*

UNITED STATES OF AMERICA,
3D DISTRICT COURT,
TERRITORY OF UTAH.

(Indorsed:) No. . District court, third judicial district, county of Salt Lake. , plaintiff, against , defendant. Certified copy of order.

45 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake, on the 18th day of March, A. D. 1875.

Present, the Hon. Ja's B. McKean, judge of the third judicial district.

J. W. CLAMPITT & CO., PLAINTIFFS,
*vs.*
JOHN W. KERR ET AL., DEFENDANTS.

Statement settled on motion for new trial.

I, E'w'd B. McKean, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is

a full, true, and correct copy of an order made in the above-entitled action, on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court this sixteenth day of June, 1875.

E'W'D B. McKEAN,
*Clerk.*

UNITED STATES OF AMERICA,
3D DISTRICT COURT,
TERRITORY OF UTAH.

By WILLIS P. McBRIDE,
*Deputy Clerk.*

(Indorsed:) No. . District court, third judicial district, county of Salt Lake. , plaintiff, against , defendant. Certified copy of order.

46 TERRITORY OF UTAH,
*County of Salt Lake, ss:*

I, E'w'd B. McKean, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint, summons & return, stipulation, answer, verdict, judgment on verdict, notice of motion for new trial, statement on motion for new trial, order of court overruling motion, with exceptions thereto, notice & undertaking, &c., on appeal; all of which are now on file in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 15th day of May, A. D. 1875.

E'W'D B. McKEAN,
*Clerk,*

UNITED STATES OF AMERICA,
3D DISTRICT COURT,
TERRITORY OF UTAH.

WILLIS P. McBRIDE,
*Deputy Clerk.*

(Indorsed:) J. W. Clampitt & Co. vs. John W. Kerr & Co. Undertaking on appeal. Filed May 8, 1875. E'w'd B. McKean, clerk, by Willis P. McBride, deputy clerk.

47 In the supreme court, Utah Territory. On appeal from the 3d district court.

JOHN W. CLAMPITT ET AL., RESPONDENTS,
*vs.*
JOHN W. KERR ET AL., APPELLANTS.

Now comes the above-named appellant and moves the court for an order returning the transcript filed in this cause and in this court to the court below, that the same may be there corrected from the records there on file in the following particulars:

That the date of the rendition of the verdict may be inserted.

That the filing of the statement on motion for new trial may be inserted.

That the filing of notice of appeal may be inserted.

HEMPSTEAD & KIRKPATRICK,
*Att'ys for Apellants.*

(Indorsed:) In the supreme court, Utah Territory. John W. Clampitt et al., respondent, vs. John W. Kerr et al., appellants.

Filed in the office of the clerk of the supreme court of Utah Territory this 16th day of June, A. D. 1875.

J. H. BEADLE, *Clerk.*

48 At a session of the supreme court of the Territory of Utah, held at the court-house, in the city and county of Salt Lake, on the 16th day of June, 1875.

JOHN W. CLAMPITT ET AL., RESPONDENTS,
*vs.*
JOHN W. KERR ET AL., AP'ELLANTS.

Appeal from 3d district court.

Upon motion of Mess. Hempstead and Kirkpatrick, attorneys for ap'ellants, it is ordered that the transcript filed herein be returned to the clerk of the third district court, with instructions to supply the defects in said transcript in the particulars suggested in appellant's motion, this day filed in this court.

I, Cha's A. Gould, clerk of the supreme court in the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court this seventeenth day of August, 1875.

[SEAL.] CHA'S A. GOULD, *Clerk*,
By JOHN L. VANDEWATER,
*Deputy Clerk.*

49 At a session of the supreme court of the Territory of Utah, held at the court-house, in the city and county of Salt Lake, on the 17th day of June, 1875.

JOHN W. CLAMPITT ET AL., RESPONDENTS,
*vs.*
JOHN W. KERR ET AL., AP'ELLANTS.

Appeal from 3d district court.

The court made the following order:

The clerk of the third district court having returned into this court amendments to the record herein, in pursuance to the order herein made yesterday, objections are made thereto by respondents, who moved to exclude the same from the record; and upon consideration thereof, the court admit, as a proper perfection of the records, the copy from the journal of the court below, of the date of 11th of November, 1875, of the verdict of the jury in said case, and the time of its rendition had as to the paper containing journal-entry of the date of 18th March, 1875, in the words—

"Statement settled on motion for new trial."

The same is excluded as a part of the record. And as to the paper returned in these words:

50 "Defendants may have until and including the 12th day of December to serve this statement."

December 11, 1874.

J. C. HEMMINGWAY,
*Attorney for Plaintiffs.*

Copy served this 12th day of December, 1874. Numbering of lines waived.

J. C. HEMMINGWAY,
*Attorney for Plaintiffs.*

It is agreed by counsel of both parties, in open court, that said words and language were endorsed upon the original statement for a new trial, but not carried into the engrossed statement, and that such fact may be regarded as a fact in the case.

This cause was then argued upon its merits by H. Gamble, esq., for appellants, and J. C. Hemmingway for respondents.

Submitted and taken under advisement by the court.

Court adjourned till to-morrow at 9.30 a. m.

D. P. LOWE, *C. Justice.*
PHILIP H. EMERSON,
JACOB S. BOREMAN,
*Associate Justices.*

I, Cha's A. Gould, clerk of the supreme court in the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action, on the date mentioned in the caption thereof.

51 In witness whereof I have hereunto set my hand and the seal of said court this seventeenth day of August, 1875.

[SEAL.] CHA'S A. GOULD, *Clerk*,
By JOHN L. VANDEWATER, *Dep'y C.*

52 At a session of the supreme court of the Territory of Utah, held at the court-house, in the city and county of Salt Lake, on the 26th day of June, 1875.

JOHN W. CLAMPITT ET AL., RESPONDENT',
*vs.*
JOHN W. KERR ET AL., APPELLANT'.

Appeal from 3d district court.

This cause having been heretofore fully argued in open court by counsel for the respective parties, and the court being fully advised in the premises, it is ordered and adjudged that the judgment of the court below be, and the same is hereby, in all things affirmed with costs.

Remittitur is stayed for ten days, in order to give time to obtain writ of error and to prepare and serve citation for taking the case to the Supreme Court of the United States.

I, Cha's A. Gould, clerk of the supreme court in the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court this seventeenth day of August, 1875.

[SEAL.] CHARLES A. GOULD, *Clerk*,
By JOHN L. VANDEWATER, *Deputy C.*

53 I, Cha's A. Gould, clerk of the supreme court of the Terrritory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of complaints, summons and return, stipulation, answer, verdict, judgment, notice of motion for new trial, motion for new trial,

statement on motion for new trial, order overruling the motion for new trial, notice of appeal, stipulation for time to serve statement, motion to settle statement, undertaking on appeal from the district court of the 3d judicial district of the Territory of Utah to the supreme court of the Territory of Utah, copy of the entry in the minutes of the district court of the 3d judicial district, of the date of November 11th, 1874, of the verdict of the jury in said case and the time of its rendition, and the certificate of the clerk of the 3d district court of the transcript on file in this court. Also, of the motion of appellants to return the transcript to the court below for correction; and also, of the general orders made in this court on the 16th and 17th days of June, 1875, respectively, and also of the judgment rendered in the foregoing cause.

In witness whereof I have hereunto set my hand and the seal
54 of the supreme court of Utah, at Salt Lake City, this day, eighteenth of August, A. D. 1875.

[SEAL.] CHA'S A. GOULD,
*Clerk of Supreme Court of Utah,*
By JOHN L. VANDEWATER,
*Deputy Clerk.*

55 In the supreme court of the Territory of Utah.

JOHN W. CLAMPITT ET AL., RESPONDENTS,
*vs.*
JOHN W. KERR ET AL., APPELLANTS.

Know all men by these presents that we, John W. Kerr, Frederick H. Myers, and Louis Cohn, are held & firmly bound unto John W. Clampitt and James H. Nounnan in the full and just sum of eight thousand dollars, to be paid to the said Clampitt & Nounnan, their attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this twenty-ninth day of June, one thousand eight hundred and seventy-five.

Whereas the above-named John W. Kerr et al. have prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment in the above-entitled suit by the supreme court of the Territory of Utah:

Now, therefore, the condition of this obligation is such, that if the above-named Kerr et al. shall prosecute *his* said of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

56 JOHN W. KERR. [SEAL.]
FREDERICK H. MEYERS. [SEAL.]
LOUIS COHN. [SEAL.]

Sealed and delivered in presence of—
C. A. GOULD.

TERRITORY OF UTAH,
*County of Salt Lake, ss:*

John W. Kerr, Frederick H. Meyers, and Louis Cohn, being duly sworn, on their oaths severally, each for himself, says that he is worth the

full sum set forth in the foregoing obligation over and above all his just debts and liabilities, exclusive of property exempt from execution.

JNO. W. KERR.
FREDERICK H. MEYERS.
LOUIS COHN.

Subscribed and sworn to before me this 29th day of June, 1875.

[SEAL N. PUBLIC.] C. A. GOULD,
*Notary Public.*

Also subscribed and sworn to before me this 29th day of June, A. D. 1875.

[SEAL SUPREME COURT.] JOHN H. BEADLE,
*Clerk Supreme Court, Utah Territory,*
By CHA'S A. GOULD,
*Deputy Clerk.*

TERRITORY OF UTAH,
*County of Salt Lake, ss:*

The above and foregoing bond is hereby this day approved by me. July 2nd, 1875.

D. P. LOWE,
*C. J. Supreme Court of Utah.*

57 I, Cha's A. Gould, clerk of the supreme court of the Territory of Utah, hereby certify that the foregoing is a true and accurate copy of the undertaking on appeal from this court to the Supreme Court of the United States in the above-entitled action.

In witness whereof I hereto set my hand and affix the seal of the supreme court of the Territory of Utah, at Salt Lake City, this eighteenth day of August, A. D. 1875.

[SEAL.] CHA'S A. GOULD,
*Clerk of the Supreme Court of Territory of Utah.*
By JOHN L. VANDEWATER, *D. C.*

(Indorsed:) In the supreme court, Territory of Utah. John W. Kerr and John Doe, plaintiffs in error, vs. John W. Clampitt and James H. Nounnan, defendants in error. Bill in error.

Filed in the office of the clerk of the supreme court of the Territory of Utah July 3, 1875, at 2.45 o'clock p. m.

CHA'S A. GOULD,
*Clerk of the Supreme Court,*
By E. W. WIGGINS,
*Dep'y Clerk.*

58 United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein John W. Kerr and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable David P. Lowe, chief justice of the supreme court of Utah, this fifth day of October, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] D. P. LOWE,
*J. C. Sup. Court Utah.*

On this second day of July, 1875, personally appeared before me the subscriber, Hamilton Gamble, and makes oath that he delivered a true copy of the within citation to J. C. Hemingray, esq., attorney for defendants in error.

HAM. GAMBLE.

Subscribed and sworn to before me this 2nd day of July, 1875.

CHARLES A. GOULD,
*Clerk of the Sup. Court of Utah,*
By E. W. WIGGINS,
*Dep. Clerk.*

(Indorsed:) In the supreme court, Territory of Utah. John W. Kerr and John Doe, plaintiffs in error, vs. John W. Clampitt and John Doe, defendants in error. Citation.

Filed in the office of the clerk of the supreme court of the Territory of Utah July 3rd, 1875, at 2.45 o'clock p. m.

CHARLES A. GOULD,
*Clerk of the Supreme Court,*
By E. W. WIGGINS,
*Dep. Clerk.*

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court before you, between John W. Clampitt and James H. Nounnan on the one part and John W. Kerr and John Doe on the other part, a manifest error hath happened, to the great damage of the said John W. Kerr and John Doe, as by their complaint appears:

We, being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings
60 aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, the fifth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

Attest:
[SEAL.]

CHARLES A. GOULD,
*Clerk of the Supreme Court of Utah,*
By E. W. WIGGINS,
*Dep. Clerk.*

(Indorsed:) In the supreme court, Territory of Utah. John W. Kerr and John Doe, plaintiffs in error, vs. John W. Clampitt and James H. Nounnan, defendants in error. Writ of error from Sup. C't of United States.

Filed in the office of the clerk of the supreme court of the Territory of Utah July 3rd, 1875, at 2.45 o'c. p. m.

CHARLES A. GOULD,
*Clerk of the Sup. Court,*
By E. W. WIGGINS,
*Dep. Clerk.*

(Indorsement on cover:) No. 108. John W. Kerr and John Doe, plaintiffs in error, vs. John W. Clampitt and James H. Nounnan. Utah Territory sup. court. Filed 6th September, 1875.

OCTOBER TERM, A. D 1877.

# Supreme Court of the United States.

*No. 108.*

JOHN W. KERR AND JOHN DOE,

*Plaintiffs in Error.*

*against*

JOHN W. CLAMPITT AND JOHN H. NOUNNAN,

*Defendants in Error.*

**Error to the Supreme Court of the Territory of Utah.**

# BRIEF FOR THE PLAINTIFFS,

BY

SHELLABARGER & WILSON,

OF

*WASHINGTON, D. C.*

Washington, D. C.:

THOMAS M'GILL & CO., PRINTERS AND STEREOTYPERS.

1877.

# Supreme Court of the United States.

*No. 108.*

JOHN W. KERR AND JOHN DOE,
PLAINTIFFS IN ERROR.

*against*

JOHN W. CLAMPITT AND JAMES H. NOUNNAN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR PLAINTIFFS IN ERROR.

## STATEMENT OF THE CASE.

1. The defendants in error, Clampitt & Nounnan, sued the plaintiffs in error, Kerr & Doe, in the District Court of the Third District of Utah, November 2, 1872, upon and for breach of the written agreement between plaintiffs and defendants, which is fully set out in petition, (Record, pp. 1 and 2,) which contract bound Clampitt & Co. to forthwith furnish 45,000 ties to Kerr & Co., at designated time and place, and on designated terms; and Kerr & Co. agreed to haul said ties to Bear river, and, on certain designated terms and conditions, to flood the same to Kerr & Co.'s boom, at Corinne, Utah, "*without unnecessary delay;*" and the

*gravamen* of the complaint is, that this service was not performed by Kerr & Co., without unnecessary delay, or with reasonable diligence, whereby Clampitt & Co. were deprived of sales of these ties, and were subjected to designated loss. (Record, pp. 1, 2, 3.)

The petition also states, as second cause of action, sale of 35,313 ties, at $17,656.

2. The answer of Kerr & Co. was filed 12th December, 1872, and denies the allegations of petition, as follows: (1.) That plaintiffs performed the conditions of said agreement on their part. (2.) Denies that Clampitt & Co. delivered said ties within the distances from the river or at such accessible places as the contract required. (3.) Denies that the ties, so delivered, would bear inspection, were cut off at the top, or were free from incumbrance, as contract required. (4.) Denies that Kerr & Co. ever accepted ties delivered by Clampitt & Co., as a performance of the contract in that behalf. (5.) Denies that Kerr & Co. failed or were negligent in hauling said ties to the river, as agreed. (6.) Denies that, by due diligence, said ties could have been delivered at river by 15th September, as petition charges. (7.) Denies that, from August 6, 1869, to January 1, 1870, the water was such in said river as to transport said ties to said boom. (8.) Denies that, by reasonable diligence, Kerr & Co. could have transported said ties to said boom by 1st November, 1869, or sooner than they were transported. (9.) Denies that Clampitt & Co. were not notified of the delivery of the ties, at Corinne, till May, 1871, and charges that they were notified in March, 1870, and requested to take away and pay for said ties. (10.) Denies that, in October, November, and December, 1869, said ties were worth not under $1.10, or could have been sold for that, as averred, and, on contrary, avers they were not worth over forty cents each. (11.) Denies that Kerr & Co.'s neglect to deliver, as agreed, had prevented Clampitt & Co. from delivering the ties to persons who had agreed to take them at $1.10, or from delivering them to persons at any other price, and denies that default of said defend-

ants, Kerr & Co., had put plaintiffs to loss of $17,000, or any other sum.

And the answer proceeds, by way of counter claim, to further allege, as follows: (1.) That the defendants transported ties to river, in strict accordance with contract. (2.) But ties were not cut off at top, nor delivered within agreed distances from river, nor in places accessible to teams, as agreed, whereby their transportation was delayed. (3.) That, from 6th August, 1869, to March, 1870, there was not sufficient water in said river to transport said ties, and defendants used due diligence, and transported said ties, as per contract, to Bear river, and thence, in November, 1869, floated them to Hampton's bridge, where they were detained, by low water and ice, till March, 1870, and then floated them to said boom, about March, 1870, and without unnecessary delay. (4.) That, about —— day of April, 1870, defendants notified plaintiffs that ties were at Corinne, as per contract, ready for delivery, and demanded the said pay therefor, $27,000, which was, and ever since has been, refused, and that defendants have fully performed their part of said contract. (5.) That plaintiffs' neglect to receive ties, when so notified, in April, 1870, subjected defendants to $4,872.54 of expense in removing said ties to railroad, for which, and said $27,000, plaintiffs are indebted to defendants, under said contract. (6.) That, after said notice to plaintiffs to pay said $31,872.54, and (after notice,) defendants, on 23d January, 1872, sold said ties for best price could get, to wit, $14,125.40, which, being credited on said $31,872.54, leaves due defendants $17,747.30, for which, and interest, judgment asked. (Record, pp. 5, 6, 7.)

Answer also denies allegations as to said second cause of action.

3. This shows the exact state of the issue, which was tried by a jury, and, on 10th November, 1874, jury gave verdict for plaintiffs for $3,583, for which court gave judgment, 11th November, 1874. (Record, pp. 8 and 9.)

4. Notice of motion for new trial, as required by statute. (Record, pp. 9 and 10.)

5. Motion for new trial by defendants, made 16th November, 1874, which fully set out the grounds of the motion. (Record, p. 11.)

6. Statement of grounds of motion for new trial, as required by sections 1419 and 1420, pages 453 and 454, of Compiled Statutes of Utah, was duly agreed upon and certified and signed by the attorneys for the parties, and fully discloses the exceptions and grounds of motion. (Record, pp. 12 to 16.)

7. May 1, 1875, District Court consider and pass upon each of the assigned grounds for new trial, and overrule the motion. (Record, p. 17.)

8. Notice by defendants of appeal to Supreme Court of Territory, filed 3d May, 1875, and served same day. (Record, pp. 17, 18.)

9. On 26th June, 1875, the case was heard by the Supreme Court, upon the record and assignment of errors, which is found on pages 10 to 16, inclusive, of the record, and the Supreme Court affirmed the judgment of the court below. (Record, p. 23.)

## Assignment of Errors.

The plaintiffs in error assign the following as error in the record in this case:

1. The court erred in suffering the testimony of Alex. Majors, as a witness for the plaintiffs below, giving the market value of the ties in controversy to be considered by the jury, when it appeared by the examination of said witness that he had no other knowledge whatever about such market value of said ties (they being white pine) than what he got by his contract for red-pine ties, and only had an "impression or vague recollection," (Record, p. 12;) and also that the witness was allowed to be asked and to answer as to the "*reputation*" of the value of ties.

2. The court erred in allowing the jury to consider the testimony of James H. Nounnan, as to the market price of said ties, when he testified that all he knew about the

market price thereof was from "what he had a contract to sell his for." (Record, p. 12.)

3. The court erred in excluding the evidence of Alex. Topouce, as to the incumbrances upon said ties. (Record, p. 12.)

4. The court erred in giving to the jury the 4th instruction asked by the plaintiff below. (Record, pp. 12, 13.)

5. The court erred in giving to the jury the 8th instruction asked for by the plaintiff below. (Record, p. 13.)

6. The court erred in giving to the jury the 9th instruction asked by the plaintiff below. (Record, p. 13.)

7. The court erred in refusing to give the 3d instruction asked by the defendant below. (Record, p. 13.)

8. The court erred in refusing to give the 4th instruction asked by the defendant below. (Record, p. 13.)

9. The court erred in refusing to give the 7th instruction asked by the defendant below. (Record, p. 13.)

10. The court erred in refusing to give the 13th instruction asked for by the defendant below. (Record, p. 13.)

11. The court erred in refusing to give the 14th instruction asked for by the defendant. (Record, p. 14.)

## BRIEF.

The first assignment of error is, that the court erred in allowing the jury to consider the evidence of Alex. Majors, who testified for the plaintiff below, as disclosed by two questions and answers. (Record, p. 12.) In one, the witness gives the price of red-pine ties, at Corrinne, at $1.40, and white pine, like those in controversy, at one-third less, and then adds, on cross-examination, "*that he had a contract for his ties, and had no other way of fixing the market value of ties than his contract, and his contract called for red-pine ties.*" Then, to fortify the witness as having the requisite knowledge about the market value, the plaintiff below asked him: "Do you know, BY REPUTATION, what the price of white-pine ties were?" and then, upon exceptions by the defendants below, the court refused to exclude this

question as to the "reputation" about this market value, and also suffered the answer thereto, *based on reputation*, to go to the jury, which said: "I only go by my impression or vague recollection," &c.

Now, this is manifest error, because—

1st. If this evidence is sought to be maintained as "opinions" of the witness as to market value, then this is not one of the cases where opinions are allowed by the law.

"Mere opinions respecting the value of property in common use, such as horses and wagons, or lands, concerning which no particular study is required or skill possessed, are not admissible." (1 Greenl. Ev., 575, note 3 to sec. 440, 7th ed.; Robertson *v.* Stark, 15 N. H., 109; Rochester *v.* Chister, 3 N. H., 394; Peterborough *v.* Jaffrey, 6 N. H., 462; Whipple *v.* Walpole, 10 N. H., 130; Dunlap *v.* Snyder, 17 Barb., 561; Protection Insurance Company *v.* Harmer, 2 O. S. R., 452, 457; 1 Smith's Lead. Cases, 644, note.)

The evidence of this witness was not sought for or introduced in the shape of opinions; and if it were, he did not qualify as an expert, which is requisite in all cases where mere opinions as to values are admissible. (Van Deusen *v.* Young, 29 Barb., 20; 1 Phil. on Ev., notes to side page 785, 5th Am. ed.)

This evidence is, therefore, not admissible, nor offered in any other view than as the ordinary proof of a simple matter of fact, such fact being the market value of white-pine ties at Corinne in October, November, and December, 1869.

We therefore have the question, first, whether one who declares, explicitly and without any qualification, that he had a contract for ties, and had *no other way of fixing the market value of ties than his contract*, and that his contract called for red-pine ties, can testify as to the value of white-pine ties. In other words, can a witness swear to a fact like an existing market value, who swears he knew not a thing on the subject, save that he had sold a different sort of commodity for a certain price? Plainly, the fact that he had made a single specific sale of a different commodity, did

not possess him of knowledge of the market value of the commodity he knew nothing about, for precisely the same reason that proof of a single sale of a commodity, at a given price, has no tendency, in law, to show the market value of that commodity; and the courts never suffer such proof in fixing a market value.

McCracken *v.* West *et al.*. 17 O. R., 16–24.

But this error was carried still further when the court suffered the witness to answer what was *by reputation* the market price. The market price of the ties at Corinne was the very gist of the plaintiff's whole case. To suffer one to fix that price, who swore he knew absolutely nothing about it, save that he made one sale of a different sort of tie, saying nothing about what knowledge that sale gave him, or how, or when, or through whom, or at what price he made it, is certainly not lawful. Then, to suffer that witness's evidence on market value to stand, after he has sworn that his knowledge—based, as the question asked him to base it, on "reputation" of market value—was a mere impression or vague recollection, would be, as seems to us, simply preposterous. Giving "impressions" or "vague recollections" is bad enough, (1 Cowen R., 81;) but to suffer a vague recollection or impression about what was the "reputation" of the market value, would be evidently erroneous. But this is precisely what was allowed.

The question, therefore, presented is, may a witness who has, in legal effect, said to the court, "I know nothing about the market value of the commodity you ask about," proceed to give to the jury evidence of what that market value was? That this may be done will hardly be claimed.

The exact principle involved in this case will be found decided, in favor of the position we here assert, in the following cases:

Lamoure *v.* Caryl, 4 Den., 370, 373, 374, and cases cited.

Lewis *v.* Trickey, 20 Barb., 387.

Harris *v.* Ely, 1 Clinton's Dig., 865, sec. 130.

Thorn *v.* Couchman, 28 How., 95.

This objection is the identical one commented upon in the case of Lewis *v.* Trickey, 20 Barb., 391, 392, where the court says, "The defendant offered to prove by his witness what the plaintiff's services were worth, over and above his board, clothing, and schooling, furnished by the defendant, without proving, or offering to prove, that the witness knew the quantity or value of either item assumed by the question to have been furnished. This, the referees properly suggest, in making their decision, would be putting the witness in their place, and making him judge of the entire case," &c., &c.

The case above cited, of Thorn *v.* Couchman, is the identical case here involved, and, as expressed in the syllabus, holds that "witnesses cannot testify to the value of an article without knowledge of it. Thus, if witnesses testify that they have no personal knowledge of the qualities of a cow, they cannot be permitted to testify as to the value of the use for a given time. Assuming that she was an ordinary cow, does not authorize the testimony."

The second assignment of errors relates to the submission to the jury of testimony of the plaintiff Nounnan, (Record, p. 12,) as to the market value of ties, after he, on cross-examination, had sworn that *all he knew about the market price of ties at Corinne is from what he had a contract to sell his for.*" In other words, a witness, knowing nothing whatever about market price of the commodity in question, at the place in question, save that he had a contract for the ties in suit, at $1.10, is thereby qualified to fix with the jury the market price.

The same authorities above cited apply to and control this assignment of errors.

The exclusion of the evidence of Alex. Topouce, (Record, p. 12,) in which defendant below attempted to show that the ties, as furnished by plaintiffs below to the defendants, were not furnished "*un*incumbered" and "free from trouble," as the contract bound the plaintiff to supply them; and that the defendants were "troubled" and delayed about the delivery, and were, moreover, damaged, in that

their security, held by means of their stipulated lien, was impaired,—was wrong. It was simply a refusal, by the court, to suffer defendants below to show that plaintiff had not kept the first stipulation of their contract, (Record, p. 1,) when the breach so offered to be proved, in at least two respects, was material for the defense: (1,) in that it tended to meet the charge of negligent delay in delivery, (2,) and tended to show a non-fulfillment, by plaintiffs, of a condition precedent to the plaintiffs' right to recover at all in the action.

The fourth error assigned is, that the court erred in giving to the jury the fourth instruction asked by the plaintiffs, which was given in these words:

"If the jury *believe from the evidence* that it was impossible to have delivered the ties at Corinne between the 28th day of July, 1869, and the 10th day of December, 1869, *and the defendant, nevertheless, undertook to deliver them there within that period*, they are bound by their contract, and the jury must find for the plaintiff." (Record, pp. 12 and 13.)

It will be observed that there was no issue about the contract set forth in the petition (Record, pp. 1 and 2) being the true, full, and only contract between the parties, and the terms of which governed the case. So the answer and counter-claim expressly admit, (Record, p. 6, &c.,) and so the entire record shows.

It will also be observed that this fourth charge, given on request of plaintiff in express words, submitted to the jury the question, whether the evidence showed that the defendants "undertook" to deliver the ties at Corinne between the 28th of July and the 10th of December, 1869. In other words, the record shows that *all the evidence there was or could be submitted to the jury* upon the point, as to *when* the defendants undertook that the delivery should be completed, was contained in the written contract, and that its making and binding force were wholly undisputed. What the defendants "undertook" to do, on this point, was therefore to be determined wholly and exclusively from the

terms and legal effect of said admitted written contract; yet this fourth charge expressly commits to the jury to find out, "from the evidence," whether the defendants undertook to deliver the ties between 28th July and 10th December, 1869. The contract being admitted by the pleadings to be binding, and by itself conclusively determinative of that point, and being all the evidence offered or permissible on the point, *it* settled the point as to what the defendants "undertook," touching the said time of delivery; and in in *what way* this writing settled the point is *wholly a question of law* for the court, and cannot be by the court referred, as this fourth charge referred it, to the jury to find out "from the evidence." Here there were no claims made that this point, as to time of delivery, was affected by any words of art or by any surrounding circumstances to be found by the jury. What the contract made the defendants' undertaking, as to time of delivery, to be, depended wholly on the legal effect of the wording of the contract, and that legal effect it was for the court, and not for the jury to find.

2 Parsons on Contracts, 492, and cases in note *r*.
U. S. *v.* Shaw, 1 Clifford, 317.
Turner *v.* Yates, 16 Howard, 14.
Drakeley *v.* Grigg, 8 Wall., 242–268.
U. S. *v.* Gilmore, 7 Wall., 495.
Nunez *v.* Dantel, 19 Wall., 560.
Goddard *v.* Foster, 17 Wall., 124–142.
Ward *v.* U. S., 14 Wall., 28–39.

But the giving of this fourth charge is erroneous, for another reason. It indicates to the jury not only that it is within its province to find out what the written contract requires, as to the time of delivery, but also that the jury may find from the evidence in the case that there was an absolute and unqualified agreement to deliver, at all events, within a specified time, without regard to whether that were possible or not. The thing the court here instructed the jury that it was at liberty to find from the evidence—

namely, that the defendants engaged to deliver the ties absolutely, and whether that were possible or not, between 28th July and 10th December—was, *in that case*, a legal impossibility, rendered so by the written contract, admitted by the pleadings as the one and only contract fixing the obligations of the parties; and the legal effect of which the court was bound to give in charge to the jury. The legal effect of the contract, which the court was bound to know and charge to the jury, secured to the defendants all the time for delivery which was requisite and which did not involve "*unnecessary* delay." So it is expressly covenanted. Then the last clause expressly covenants for the allowance of time beyond four months, if the defendants should be unable to deliver in that time. Yet, in the face of this, the fourth instruction tells the jury, "you are at liberty, in this case, to find that the contract was of a kind to bind the defendant absolutely, and whether that were possible or not, to deliver in four months." This is plainly erroneous.

The fifth assignment of error raises the question whether the eighth instruction given on the plaintiff's motion, was erroneous; which instruction was, that "When both parties to a contract are innocent of wrong, and one of them must suffer, he whose fault occasioned the injury must bear the loss."

This is erroneous, for the reason that it is wholly inapplicable to the case, and misleading.

The case is one purely of *contract* right and obligation. If defendants had not broken their *contract*, they were not liable in *that* action, no odds what moral dereliction or want of "innocence" was shown against them, resulting in loss to plaintiff. If they had broken their contract, then they could not "be innocent," in the sense of the law, and the charge had no possible application to the case, or to any state of proofs, which was possible under the pleadings.

But the charge was one, in effect, saying to the jury: "This is a case where one or the other party has been guilty of a wrong, and that has resulted in loss to one or the other, and you shall find out, not what the contract is

and who broke it, but who is the guilty man and who the 'innocent,' and you shall punish him who is guilty."

Such instructions, having no possible application to the case, and so eminently conducive to misleading the jury, are never suffered to stand. In the words of this court, as found in Gibson *v.* Stevens, (8 Howard, 383,) "The instruction was calculated to mislead the jury into a conclusion that the suit was against the defendants for fraud," &c. "'The inquiry' (of innocence) did not arise in the case. What was said could hardly fail to confuse and mislead." Words of this court, in Blackburn *v.* Crawford, 3 Wall., 194, 195.

As to charges which have no legal relations to any facts in the case, see U. S. *v.* Breitling, 20 Howard, 252–255.

Where the general effect of the charge is misleading, it is erroneous and reverses the case. (Hall *et al. v.* Weare, 2 Otto, 728, 731, 732.)

The other assignments of error relate to the charges asked by the defendants and refused by the court, as set out on pages 13 and 14 of the printed record. Upon these assignments we rely, especially on the refusal to give the third and fourth instructions.

For example, since it was the duty of the court, when asked to charge the jury upon the legal effect of the provisions of this written contract, how can it be possible that there was not error in the court's refusal to instruct the jury, as asked in the fourth charge. The case before the jury was, whether defendants had delivered *with reasonable diligence*, and whether plaintiffs had done their part by supplying "45,000 good dry ties, which would bear inspection, cut off at top, &c., and had furnished them, *free from all incumbrances and trouble* to Kerr & Co." Such is the wording of the contract.

Certainly this contract did not suffer plaintiffs to furnish ten ties in one log, and to throw on the defendants the delay, work, trouble, &c., of cutting them up. If it did not, then the refusal to give the charge was, of course, error.

But these assignments of error, in regard to the refusal

of the instructions asked by the defendants, are all of a kind which admit of no comment which will be of service to the court, because they simply present the questions whether they correspond with the terms of the contract.

We therefore submit them without further remark.

By SHELLABARGER & WILSON,
*For Plaintiffs in Error.*

# Supreme Court United States.

**No. 108.**

JOHN W. KERR and JOHN DOE,
*Plaintiffs in Error.*

*vs.*

JOHN W. CLAMPIT and JOHN H. NOUNAN,
*Defendants in Error.*

ERROR TO SUPREME COURT OF THE TERRITORY OF UTAH.

*Brief for Plaintiffs in Error, in reply to the Brief for Defendants in Error.*

By SHELLABARGER & WILSON,

*Thomas McGill & Co., Printers, Washington, D. C.*

# Supreme Court of the United States.

*No. 108.*

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JOHN W. KERR AND JOHN DOE, PLAINTIFFS IN ERROR,

*vs.*

JOHN W. CLAMPIT AND JOHN H. NOUNAN, DEFENDANTS IN ERROR.

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ERROR TO SUPREME COURT OF THE TERRITORY OF UTAH.

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We submit the following in reply to the argument of General Henkle in behalf of the defendants in error.

An examination of the state of the statutes of the Territory of Utah, at the date of the trial and proceedings in the above case, to wit, trial and judgment, November 1874, in the District Court, (see Record, 17) and judgment in the Supreme Court of the Territory, 26th June, 1875, (see Record, 23,) will, we think, show that General Henkle has fallen into a mistake in regard to the statutes governing the proceedings in this case.

The practice, pleadings, and modes of proceeding of the territorial courts, as well as their respective jurisdictions, are left by Congress to the legislative action of the territorial assemblies. (Hornbuckle *v.* Toombs, 18 Wallace, 648.)

If, therefore, we find out the state of the statutes of the territory at the date of this trial that will establish the law governing the present inquiry raised by this record, unless

some act of Congress can be pointed out changing the law of the territory, as we herein show it to be. There is no such act of Congress and statutes we here cite control this case.

General Henkle has constructed his argument upon the theory that bills of exception, as mentioned in section 1056, quoted on the sixth page of his brief, are still required by the laws of Utah, in order to enable the party excepting to get before the Supreme Court of the Territory, for review on appeal, errors of law, arising and excepted to in the progress of the trial, and that "the statement of the case" provided for in section 189 of the Code of 1870, (being 1414 of the compiled laws of 1876,) and in other sections of this code does not take the place of, nor perform the office of the bill of exceptions, nor enable the excepting party to secure a review of the final judgment itself.

He thinks the statement of the case mentioned in sections 189, 195, &c., of the code of 1870, only enables the party excepting to make use of this upon a motion for a new trial, and to secure a review of the order made, disposing of the motion for a new trial. In this, we think he is manifestly in error. The error has probably arisen out of the omission to observe that the act of the 18th January, 1861, "Providing for appeals to the Supreme Court," (see Compiled Laws, page 349,) and from which he quotes section 1056, on the sixth page of his brief, so far as it relates to civil proceedings, was repealed in 1870, and has, therefore, no manner of application to the case at bar. Why this section, 1056, is retained in the compiled statutes of 1876 is thus explained by the editor of this compilation, in note 1, on page 349, of the compiled statutes;

"NOTE 1.—The mode and manner of appeals in civil cases is *fully* provided for in the civil practice; but as this act includes appeals in criminal cases, it is embodied as a law in this compilation."

It will be seen by a scrutiny of the Civil Code of 1870, and which is embodied in the compilation of 1876, that it is, as the editor's note says, a full and complete revision of the

practice as to exceptions, new trials, appeals to the Supreme Court, and every other thing arising upon the face of the present record. By turning to section 605 of this civil code, (page 563, compiled laws of 1876,) it will be seen that this act from which section 1056 is quoted, is expressly repealed, so far as it conflicts with the code.

The editor's note, which we have quoted, accurately indicates the extent of this conflict, and the code supersedes and takes the place of the act from which section 1056 is quoted in every particular relating to civil cases. The brief of counsel relies, therefore, upon a law not in force at the date of these proceedings.

The law which was in force and controlled these proceedings, is the Code of 1870. Its section 188, (1413 of Comp'd Laws,) defines an exception in these words: "an exception is an objection, taken at the trial, to a decision upon a matter of law, whether such trial be by jury, court, or referee, and whether the decision be made during the formation of a jury or in the admission of the evidence, or in the charge to a jury, or at any other time, from the calling of the action for trial, to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial or an appeal, unless the exception be material and effect the substantial rights of the parties." Section 189 of the Code (1414 of the Compilation) regulates the method of taking and putting into the record those exceptions which section 188 authorizes to be preserved; and it, in express words, authorizes and provides for every manner of exception named in section 188. And wherever such exceptions may be designed to be used, whether in reviewing a final judgment, or reviewing an order or judgment as to a new trial, they are to be embodied and "settled" in what this Code throughout, denominates "*a statement of the case.*" Amongst the things in which this section 189 expressly changes is the law quoted on the sixth page of the opposing brief, in its substituting a petition to the Supreme Court, as the means of procuring exceptions where the judge refuses to sign, for the two spectators provided for in section 1056.

The merest glance at these sections relating to exceptions as found in the Code, show that they fully supply the place of and supersede the law of 1861, from which General Henkle quotes.

Section 190 renders unnecessary any particular form of exception. Requires so much evidence, and no more, to be stated as requisite to explain the exception.

Section 192 defines a new trial as a re-examination of a fact in the same court.

Section 193 enumerates the cases in and grounds upon which a verdict or other decision may be vacated and a new trial granted. It enumerates seven of these grounds—the fifth being excessive damages; the sixth, verdict not warranted by the evidence; and the seventh, stated in these words: "Error in law occurring at the trial, and excepted to by the party making the application."

The 194th section requires the motion for a new trial to be made on affidavit, when the grounds of the motion are either the 1st, 2d, 3d, or 4th of the seven grounds enumerated in section 193. But when the grounds of the motion are either of the other seven causes, (for example, error occurring in trial,) the motion for a new trial must be "made upon *a statement* prepared as provided in the next section." The next section is 195, or 1420 of the Code.

This section 195 first provides for a notice within five days after the rendition of the verdict.

This notice we gave, and within the five days. (Rec., pp. 9 and 10.)

The section then proceeds to minutely regulate the manner of making up, agreeing up, or "settling" the paper which all the sections denominate, and which this section denominates, "the statement." The section contains the provision that, "when the notice designates, as the ground of the motion, error in law occurring at the trial and excepted to by the moving party, *the statement* shall specify the particular errors upon which the party will rely. If no such specification be made, the statement shall be disregarded." The section also provides that when the statement is agreed to "it shall

be accompanied with the certificate, either of the parties themselves, in fact, or their attorneys, that the same has been agreed upon and is correct. Such certificate is on page 16 of the Record.

The section also regulates, the matter as to what papers, evidence, &c., may be referred to in arguing the motion for new trial, and also what of these may be used on appeal from the order granting or refusing a new trial. It also provides for identifying, by the indorsement of the judge or the clerk, of the documents, &c., that were used on the trial below.

Section 196 requires the judge to state, generally in writing, the grounds upon which he grants or refuses a new trial.

Section 325 (1550 of Compd. Laws) provides that every "judgment or order in a civil action, except when expressly made final by this act, may be reversed as prescribed in this title, and not otherwise."

Section 327 "authorizes any party aggrieved to appeal in the cases prescribed in this title."

Section 328 provides that appeals may be taken, 1st, "from every final judgment by a court in which the action was commenced within a year;" 2d, from a judgment on appeal from an inferior court within ninety days; 3d, from orders granting or refusing new trials, and other orders there named, within sixty days after order. From certain interlocutory orders there named and partition orders, within sixty days.

Here it will be seen that there is distinctly and separately provided for and regulated, appeals from final judgments and appeals from orders granting or refusing new trials.

Section 329 provides that "the appeal shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered, a notice *stating the appeal from the same or some specific part thereof*, and serving a copy of the notice upon the adverse party or his attorney.

The court will find on page 17 of the record this notice of appeal, and will find that, in obedience to the statute requiring the specific part appealed from to be stated, the notice

states the appeal to be "from the judgment therein made and entered in said District Court, on the 11th day of November, 1874, in favor of the plaintiffs in said action and against said defendants, and from the whole thereof, and also from the order made and entered therein in said court, on the 1st day of May, 1875, overruling the motion of defendants for a new trial." Section 330 regulates the manner of making up the statement for appeal.

Section 333 provides for certifying to the settled statement or its being agreed upon and signed by the parties as correct.

Section 334 provides "a copy of the statement shall be annexed to a copy of the judgment roll, if the appeal be from the judgment. If the appeal be from an order, to a copy of such order."

Section 333 provides "upon appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment."

Section 337 provides "that upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal," &c.

Section 338 requires the appellant in appeals from final judgments, to "furnish the court with a transcript of the notice of appeal, and the "statement," if there be one certified by the respective attorneys of the parties to the appeal, or by the clerk of the court," &c., &c.

Section 349 provides "when judgment is rendered upon the appeal, it shall be certified by the clerk of the Supreme Court to the clerk with whom the judgment roll is filed or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed shall attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket against the original entry. In case of appeal from an order, the clerk shall enter at length, in the records of the court, the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, a brief statement

that the order has been affirmed, reversed, or modified, as the case may be, by the Supreme Court, on appeal."

It will be seen, on pages 21, 22, and 23, that "the statement of the case," as embodied in the record, from pages 11 to 16 inclusive, was incorporated into the record, was made part of the case and the record, which was carried to the Supreme Court on appeal; that certain amendments were made in the record by order of the Supreme Court, and that an agreement was made, as appears by the following words:

"It is agreed, by counsel of both parties, in open court, that the said words and language," (set out on the preceding page of the record,) "were indorsed upon the original statement for a new trial, but not carried into the engrossed statement, and that such fact may be regarded as a fact in the case."

So that the case, as it was tried in the Supreme Court of the Territory, was one in which "the statement of the case," fram pages 11 to 16, was part of the record, both in pursuance of the statute, and by agreement of parties.

From the recitation of the statutes now made, the following things appear expressly:

1st. That "the statement of the case," as provided for in sections 188, 189, 195, &c., performs the offices of, and is, by the code, the bill of exceptions, and the only bill of exceptions, known to the laws of Utah.

2d. That, by the laws of Utah, appeals may be taken to the Supreme Court of the Territory, from either a final judgment, or from certain orders enumerated in section 328. That, when an appeal is so taken, the party appealing specifies in his notice what it is from which he takes his appeal, whether from a judgment or order.

3d. That "the statement of the case" (or bill of exceptions) may be attached to the judgment-roll, and become part of the record which is made the ground and subject of review upon appeal to the Supreme Court.

4th. That, in the case at bar, such record, including "the statement of the case," as such statement is found in record, (from pages 11 to 16,) and as amended by order of court

and agreement of parties, (pages 22 and 23,) was part of the record lawfully before the court for its review and judgment in the Supreme Court.

The only additional point to be noticed is, what was the thing appealed from, and what was the judgment which the Supreme Court rendered in the present case?

General Henkle insists the appeal was from the order refusing a new trial. This is negatived by the following facts, appearing in the record:

1st. That the notice of appeal is one taken from the judgment itself. (See page 17 of the Record.)

2d. That the undertaking required by the statute, and which is a wholly different obligation when the appeal is from the final judgment, from that which is required when the appeal is from an order, is expressly an undertaking applicable to an appeal from the judgment dated the 11th of November, 1874, for thirty-five hundred and eighty-three dollars damages and three hundred and ninety-six dollars and eighty cents costs; and they make the bond cover the entire judgment, by making it in double amount of the judgment, and make it a stay of execution. (See page 19 of Record.)

3d. The judgment itself, (page 23 of the Record,) in express words, declares that it is "the judgment of the court below" which "is hereby, in all things, affirmed, with costs." Then the entry adds, "*remittitur* is stayed for ten days, in order to give time to obtain writ of error and to prepare and serve citation for taking the case to the Supreme Court of the United States."

That this judgment of the Supreme Court is an affirmance of the final judgment below, and not of the order refusing a new trial, is conclusively shown by the fact that the statute calls the act of refusing a new trial an "order," (see sec. 328;) and a final "judgment" is never called an "order," nor is that which is not in its nature a "judgment," ever called anything else than an "order."

Here the Supreme Court, in disposing of this case, uses the words, "It is ordered and adjudged that the *judgment* of the

court below be, and the same is hereby, in all things, affirmed, with costs."

Is it conceivable that in this case, where the statute expressly authorizes the appeal from the "judgment" to be taken as it was—requires the notice to state, and it does state explicitly that the "*judgment*" is appealed from—where the statute requires a specifically-described undertaking, when it is the judgment that is appealed from, and the undertaking is one appealing from a judgment—and where the Supreme Court expressly states on the face of its "judgment" that it is the "judgment" below which it affirms, and not an "order"—that this, after all, was no appeal from, nor affirmance of, a judgment?

Were it necessary, it may be readily shown, from the decisions of the Supreme Court of Utah, that this "*statement*" provided for in section 195 of Code (1420 of Compilation) is and performs the offices of a bill of exceptions in these appeals to the Supreme Court of final "*judgments*."

In the case of Backman *v.* Smith, (Hagan's Reports, 237,) the Supreme Court decides, "On an appeal from a judgment, papers and files of the court below attached to the judgment-roll will not be considered, unless they are incorporated *in the statement*, as provided in sections 195 and 330 of the Practice Act." Zuli *v.* Moritz (Hagan's Reports, 283) holds, "No appeal lies from an order sustaining a demurrer." Also held, "When the judgment-roll shows the action of the court below on demurrer, the same can be reviewed, on appeal, without *a statement* or bill of exceptions."

In the body of this opinion the court uses these words, to wit, "statement," and "bill of exceptions," as equivalent and convertible terms. The language of the court, on page 285 is: "On an appeal from a judgment, the question is raised as to whether this court can review the action of the court below on demurrer, there being no *statement* or bill of exceptions. The object of the *statement* on appeal is to bring into the record those orders and rulings, together with the facts necessary to explain them which are made in other stages of the proceedings in the case, and not during the

progress of the trial and not contained in the judgment roll. (Harper *v.* Minor, 27 Cal., 110.) The judgment in this case discloses the action taken by the court on demurrer; the recitals in it bring before us all the facts necessary to enable the court to determine whether there was error or not—that is, determine the sufficiency of the answer. They accomplish all that could be accomplished by a *statement.*"

The same thing will be found in Bankofsky *v.* Powers. (Hagan, 333.)

Gen. Henkle insists that the statement provided for in section 1420, (Code, 195,) cannot perform the offices of a bill of exceptions in an appeal of a final judgment to the Supreme Court. In all these cases and scores of others we might point to, the "statement" of section 1420 did perform the offices of a bill of exceptions. It is the only paper known to the laws of Utah that does perform the offices of a bill of exceptions.

SHELLABARGER & WILSON,
*Counsel for Plaintiff in Error.*

# Supreme Court of the United States

No 108.

## John W. Kerr and John Doe,

Plaintiffs in Error,

*vs.*

## John W. Clampit and John H. Nounnan,

Defendants in Error.

*Error to the Supreme Court of the Territory of Utah.*

BRIEF OF S. S. HENKLE, COUNSEL FOR DEFENDANTS IN IN ERROR.

# IN THE SUPREME COURT OF THE UNITED STATES.

No. 108.

JOHN W. KERR AND JOHN DOE,
PLAINTIFFS IN ERROR.

*vs.*

JOHN W. CLAMPITT AND JAMES H. NOUNNAN.

IN ERROR TO THE SUPREME COURT OF JHE TERRITORY OF UTAH.

*Brief of S. S. Henkle, Counsel for Defendants in Error.*

The record shows several issues of fact regularly made up and tried to a jury in the third Judicial District of Utah, on the 10th day of November, 1874, a verdict in favor of the defendants in error, for $3,583, and judgment thereon on the 11th day of November, 1874, for the amount of the verdict, with ten per cent. interest thereon per annum, from that date until paid, together with plaintiff's costs and disbursements; but it does not show that any exceptions were taken to the rulings of the court, either upon the admission or rejection of evidence, or upon instructions to the jury given or refused, and contains nothing purporting to be a bill of exceptions.

It does show a motion for a new trial, filed in the same

court, on the 11th day of November, and what is called "statement or motion for a new trial" filed on the 20th of March, 1875. At the foot of the statement is this agreement, signed by attorneys for both parties.

"It is hereby agreed that the foregoing shall constitute the statement *on motion for a new trial* in the above-entitled cause, and is correct." Endorsed on the statement is the following: "Settled statement on new trial, filed March 20, 1875."

In this statement certain rulings of the court purport to be given upon the admission and rejection of evidence and upon instructions to the jury given and refused, and exceptions are said to have been taken; but by express agreement of the parties by their attorneys the use of the statement is limited to the hearing of the motion for a *new trial.* That the statement related solely to the motion for a new trial is conclusively established by the following Journal entries of the court found on pages 18 and 20 of the record:

Page 18. "Statement on motion for new trial filed December 11, 1774."

Page 20. "Statement settled on motion for new trial."

Although the record on p. 17 shows that defendants below gave notice of an appeal to the Supreme Court of the Territory from the judgment entered in the verdict on the 11th day of November, 1874, as well as from the judgment of the 1st of May, 1875, over-ruling the motion for new trial, and the bond on p. 19 recites an appeal from both judgments, it was in fact, and in law but an appeal from the judgment over-ruling the motion for a new trial. No step was taken to appeal or effect the judgment of November 11, 1874, save that it would necessarily have been vacated by a judgment in favor of a new trial.

The case of Sparrow vs. Strong, reported in 3 Wall., 97, and again in 4 Wall., 584, is almost identical with this

case. That was on ejectment commenced and tried originally in the District Court of Nevada.

There were verdict and judgment for the plaintiff, a motion for a new trial over-ruled, and an appeal to the Supreme Court of the Territory. There was also a statement similar to the statement in this case, and there was a judgment of the Supreme Court affirming in all things the judgment of the court below.

The Statutes of Nevada, as that of Utah, allowed an appeal to the Supreme Court of the Territory from an order over-ruling a motion for a new trial, and it was argued with "ingenious abiltity" that the order of the Supreme Court of the Territory affirming the order below was a general judgment from which a writ of error would lie to this court: but the court held it to be "only an order affirming the odrer of the district court denying a motion for a new trial, andthat it was therefore not reviewable here on error."

It is said by the court in the same case in 5 Wall., p. 105, "the circumstance that the discretion was exercised under a peculiar statute by an appellate court, and on appeal cannot withdraw the case from the operation of the principles which control this court."

It has repeatedly been held by this court that a judgment on a motion for a new trial is not reviewable here.

Pomeroy's Lessee vs. Bank of Indiana, 1 Wall., 592.
Sparrow vs. Strong, 3 Wall., 97.
Same vs. Same, 4 Wall., 584.

This court will not review a case on error where the error is not apparent on the face of the record, unless the judgment below be founded on bill of exceptions, agreed statement of facts, special verdict, or demurrer to evidence.

Suydam vs. Williamson, 20 Howard, 592.
Pomeroy's Lessee vs. Bank of Indiana, 1 Wall., 592.
Thompson vs. Riggs, 5 Wall., 663.

Mussina vs. Caragos, 6 Wall., 363.
Generes vs. Bennerman, 7 Wall., 564.
Taber vs. Cooper, ibid, 565.
Young vs. Martin, 8 Wall.. 354.
Baltimore & Potomac R. R. vs. Trustees of Sixth Presbyterian Church, 1 Ott., 127.
Storm vs. U. S., 4 Ott., 76.

This record shows neither bill of exceptions, agreed statement of facts, special verdict, nor demurrer to evidence.

There is a "statement on motion for new trial" but it cannot be tortured into an "an agreed statement of facts."

The court says in Suydam vs. Williamson, 20 How, "when the facts are without dispute, and agreed between the the parties, a statement of the same may be drawn up and entered in the record, and submitted directly to the court for its decision without the intervention of a jury."

It is true that it is said in this statement that certain rulings of the court on the admission and rejection of evidence, and the giving and refusing of instruction to the jury were excepted to; but this does not make it a bill of exceptions. "Unless an exception is reduced to writing and sealed by the judge, it is not a bill of exceptions within the meaning of the statute authorizing it and it does become part of the record".

Pomeroy's Lessee, vs. Bank of Indiana 1, Wall, 600.

"The *rulings* of the court can only be re-examined in bill of exceptions."

Say the court in Pomroy's Lessee vs. Bank of Indiana, "none of the modes suggested, however, enable the complaining party to review or re-examine the rulings of the court, except that of the *bill of exceptions.*"

And in Thompson vs. Riggs, 5 Wall., on p. 675, the court says: "settled practice in this court is that neither the rulings of the court in admitting or rejecting evidence, or in giving

or refusing instructions, can be brought here in any other mode than by a regular bill of exceptions."

Final judgment in a Circuit Court may be re-examined in this court, and reversed or affirmed upon a writ of error founded upon an agreed statement of facts, a special verdict, a demurrer to a material pleading, or a demurrer to evidence as well as by a bill of exceptions; but none of the other modes will enable the appallate court to revise the ***rulings*** of the court in refusing to instruct the jury as requested, or the instructions as given or the ***rulings*** of the court in admitting or rejecting evidence; such rulings rest in parol and can only be incorporated into the record by a bill of exceptions, and of course cannot be re-examined in any other way."

The "statement" cannot be used as a substitute for a bill of exceptions.

The statutes of Utah, p.—, sec. 1,420, provide for this statement, but it is for the purpose of a hearing upon a motion for a new trial, primarily in the District Court.

The statute p. 349, sec. 1,050 provides for an appeal from the District Court to the Supreme Court of the Territory, "from any final order, judgment, or decree," so that the final order of the District Court over-ruling a motion for a new trial may be appealed to the Supreme Court of the Territory, and may be heard in that court on the "statement" filed in the court below; but the use of the statement is confined to the hearing upon the motion for a new trial.

A defeated litigant in the District Court has his election to move for a new trial in the same court, upon a statement such as is found here, with the right of appeal to the Supreme Court of the Territory, if the motion is decided against him, in which case the judgment of the Supreme Court of the Territory is final; or he may take and preserve his exceptions in the usual way by bill of exceptions signed by the Judge and appeal to the Supreme Court of the Territory, and from the judgment of that court, if it be against

him, he may have a writ of error to this court if the amount be sufficient to give jurisdiction.

Sec. 1,056, p. 350, of the Complied Laws of Utah is as follows:

"The hearing of the Supreme Court shall be upon the record and argument of counsel; and the district court is hereby required to sign all bills of exceptions taken to its rulings, decisons, or charge to the jury, which shall be incorporated into and constitute a part of the record of the cause; and upon refusal to sign such bills of exceptions, the same may be signed by two spectators, under oath, or two disinterested attornys, and when so signed shall be of equal validity as if signd by the judge."

Sec. 1420 provides for the statement in the record, but it is upon motion for a new trial.

A party litigant contemplating the necessity of coming to this court for the correction of errors *ore tenus* must be careful to take his exceptions and have them signed by the judge, for he can obtain a hearing here in no other way.

The case of Young vs. Martin, 8 Wall., 354, was error to the Supreme Court of the Territory of Utah. There was no bill of exceptions but minutes from the journal of the court stating the points ruled and the exceptions.

The court says, "to be of any avail exceptions, must not only be drawn up so as to present distinctly the rulings of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed they do not constitute any part of the record which can be considered by an appellate court."

Sec. 1,909, p. 337, Rev. Stats. U. S., provides that writs of error and appeals from the final decisions of the Supreme Court of the Territory shall be allowed to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Court of the United States.

There is nothing in the territorial laws in conflict with

this Statute of the United States, and if there were it could of course have no force against the paramount law.

In Thompson vs. Riggs, 5 Wall., p. 676, which was error to the Supreme Court of the District of Columbia, the court says: "Views of the plaintiffs are that the bill of exceptions is not necessary in cases removed here from the Supreme Court of this District. Reference is made to the eighth section of the act to organize the courts of this District as furnishing support to the proposition, but it is quite evident that the section referred to relates exclusively to the practice in the subordinate courts and not to the proceedings for the removal of the cause into this courtfor examnation and revision."

And again: "No one of the clauses mentioned make any provision whatever for a writ of erroror appeal to this court. Regulations upon that subject are made by the eleventh section of the same act, which provides that any final judgment, order, or decree of the court may be re-examined, and reversed, or affirmed in the Supreme Court of the United States upon writ of error or appeal in the same cases, and in like manner as is now provided by law in reference to the final judgments, orders, or decrees of the Circuit Court of the United States for this District. Writs of error and appeals are required to be prosecuted under that law in the same manner and under the same regulations, as in the case of writs of error or appeal from judgments and decrees rendered in the Circuit Court of the United States."

"When a case is brought here upon a writ of error issued under the twenty-second section of the judiciary act and there is no bill of exceptions, agreed statements, or special verdict in the transcript the general rule is that the judgment will be affirmed, as is shown by repeated decisions."

Pomeroy's Lessee vs. Bank of Indiana, p. 604, and the cases there cited.

Being of the opinion that the plaintiffs in error have no standing in this court and ~~was~~ not entitled to bring the case here, I am instructed by my clients to pray the allowance of damages under the 23d rule.

The view of the case which I take renders it unnecessary for me to attempt an answer to the brief of the learned counsel for the plaintiffs in error, for whose learning and ability I entertain the highest respect.

S. S. HENKLE,
*Counsel for Defendants in Error.*